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Vol. I

TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. 135 4

MAJOR RAYMOND LISENBA, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED JUNE 8, 1940.

CERTIORARI GRANTED OCTOBER 28, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 133

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vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

VOL. I

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IN SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

Department No. 43

Hon. Charles W. Fricke, Judge

No. 64218

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

MAJOR RAYMOND LISENBA, Defendant

Statement of Evidence

APPEARANCES:

For the People: Eugene P. Williams, Esq., and John Barnes, Esq., Deputies District Attorney of Los Angeles County.

For the defendant: Russell E. Parsons, Esq., S. J. Silverman, Esq., and William J. Clark, Esq.

H. R. Person and James O'Brien, Official Reporters.

[fol. 17] MRS. VIOLA PEMBERTON, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Mrs. Viola Pemberton.

Direct examination.

By Mr. Williams:

Q. Mrs. Pemberton, you are the wife of James Pemberton?

A. Yes, sir.

Q. How long have you been married?

A. About 9 months.

Q. Prior to that what was your name?
A. Viola Lueck.
Q. Did you know Mary James during her lifetime?
A. Yes, sir.
Q. For *low* long had you known her?
A. A little over two years.
[fol. 18] Q. Did you know the defendant, Major Raymond Lisenba, also known as Robert L. James?
A. Yes, sir. I knew him under the name of James only.
Q. Did you have a conversation by telephone with Mr. James on the 5th day of August, 1935?
A. I did.
Q. Where were you?
A. I was in my apartment.
Q. And did Mr. James call you, or did you call him?
A. He called me.
Q. Had you known him prior to that time?
A. I had known him as long as Mary had known him, one day less.
Q. Well, how long prior to the 5th of August?
A. May of that same year.
Q. Did you recognize his voice when he called you on the telephone?
A. Yes, sir.
Q. What time of the day was it when he called you?
A. About ten minutes to 2:00; close to 2:00 o'clock.
Q. In the afternoon?
A. Yes, sir.
Q. What did he say to you?
A. He told me that Mary was not feeling well enough to come down——

Mr. Silverman: Just a little bit louder, please.

[fol. 19] A. I was to get dinner if Mary was well enough to come in to town, and I was invited out to the house, and that is the reason that Mr. James was going to call——

By Mr. Williams:

Q. Never mind about the reason that he called. What did he say?
A. He said that Mary was not well enough to come in to town, and for us to come out there to dinner.
Q. What else did he say?

A. He said that she had the vegetables ready, and that we should stop to get steaks on the way, and come out after I got through work.

Q. Did he make any arrangements to meet you?

A. Yes, 7:30 that evening.

Q. Where?

A. In front of the telephone office where I am, at 5th and——

Q. Never mind, but did you meet him that evening at 7:30?

A. Yes.

Q. Was any one else with you?

A. Well, Mr. James——

Q. What did you do?

A. We drove up to a market to buy the steaks, and got some cottage cheese, and he said he would get that in case Mary couldn't eat a steak, and went out to Mr. James' home.

The Court: Keep your voice up, please. We cannot hear [fol. 20] you.

Mr. Williams: I know that it is difficult, but will you just talk loud enough so I can hear you where I am now, that is, what you have to say?

A. I will try.

The Court: You will have to try to talk louder than that.

Mr. Williams: Just remember this, that you cannot talk too loud, so let your voice out. You say you went to the James residence?

A. Yes, sir.

Q. Is that located a- 3229 Verdugo Road, in La Canada?

A. It is Verdugo Road, but I am not positive of the address.

Q. Had you been out there before?

A. Yes, sir.

Q. What time did you reach the James home?

A. Oh, I should judge about ten after, or a quarter past 8:00.

Q. Now, when you got there, did you approach the house, that is to say, did you go up in the driveway, or stop in front of the house, or which way did you go?

A. We drove up in the yard, and parked the car in the rear of the house.

Q. Now, referring to People's Exhibit 1 for identification, calling your attention to the fact that the gray portion

along the side of this is the driveway—I will call your at-
[fol. 21] tention to People's Exhibit No. 2, the gray portion along the easterly side on the driveway, where, with reference to the garage, did you stop the car?

A. Right at the back of the house, on the driveway.

Q. That is, about the northeast corner of the house?

A. Yes, sir.

Q. This being north, and this being east, and that being about at the northeast corner of the house?

A. Yes.

Q. All right. Did you get out of the car?

A. Yes, sir.

Q. And what did you do then?

A. Well, there weren't any lights, and I made the remark that they must be away, or there would be lights in the house.

[fol. 22] —and we walked in the house, James' house, and no one answered, and we looked in all the rooms and couldn't find her and then we looked for her outside. We kept calling her and nobody answered. Then I do not know who suggested—I did not, but someone suggested getting a flashlight to look in the grounds for her. Possibly she had fainted in the shrubbery and Mr. Pemberton went through the front and looked in the front way and I went into the bedroom to the left of Mary's and I was in the back bedroom, when I heard Jimmie make the remark——

Q. Who made the remark?

A. My husband, he said, "Oh, my God", and I hollered as to what it was, and he didn't answer. Mr. Pemberton said, "Buck up; she is gone".

The Court: What was the expression? I didn't get it.

(Record read by the reporter.)

A. Or "Brace up"; probably that was the expression.

By Mr. Williams:

Q. What did you do?

A. We walked over and saw Mary's head in the water, and the rest of her on the ground.

Q. Indicating the head as being in the water?

A. Yes, sir.

Q. That included her head and shoulders in the water?

A. Yes, and her hair was afloat over the top of the water.

Q. How was the head turned, did you say?

A. The head was faced right down.

[fol. 23] Q. In the position that you indicate on the diagram, People's Exhibit No. 1 for identification, where would it be?

A. Well, there is the bedroom there—and is that supposed to be the cellar door, that part there?

Q. I think it is.

A. I think that is the cellar door and then the walk and right close to the window is where the body was.

Q. Now then, if I can get a pencil, perhaps you can mark it on the diagram roughly, that is the position of the body. I will hand you a blue pencil for that purpose.

A. It is just—I should judge——

Q. Mark an oblong showing how far the body was extended into the bottom and how far out——

Mr. Parsons: Now, we cannot hear the witness.

Mr. Williams: She says, "About here".

A. This is the walk around the pond.

Q. Well, this is the walk right on here——

A. Yes, sir, and she was over onto the walk part, over the curb and into the pond.

Q. And as she lay there, her head and shoulders were down in the pond and her hips and legs were out across the walk?

A. They were.

Q. And was she lying generally, in a north westerly and southeasterly direction with the head towards the northwest?

A. Yes.

Q. The points are indicated on the map here.

[fol. 24] A. Well, possibly——

Q. That is the head was toward the northwest and the feet to the northeast?

A. Yes.

Q. Did you look at her at that time?

The Court: Just for the record; let the record show that the witness has placed, crossing the double line, a——

A. A straight line.

The Court: In place of the other and the crossing walk, going in a southeasterly direction onto the walk. Mark it with a figure 1.

Mr. Williams: Now, you may resume the witness stand.

The Court: Mr. Clark, I would rather not have you standing up there while the witness is being examined.

By Mr. Williams:

Q. Mrs. Pemberton, did you get close by there?

A. I stood toward the northwest of the pond and held the flashlight, and Mr. Pemberton was taking the body out of the water and when I saw the water dripping I turned my head and I could see.

Q. And were you there when she was taken from the water?

A. Yes, by Mr. Pemberton and I believe Mr. James.

Q. Where was the body then placed?

A. Right on the walk there next to the front——

Q. Did you observe at that time whether there was any fence or screen or anything of that sort around the pond? [fol. 25] A. Yes, there was.

Q. And from the point where her body was, where was the screen?

A. The weight of her body had crushed the screen and it was under her body.

Q. What generally was the type of screen around the body?

A. Well, I don't know about it, but I would call it on the order of chicken wire.

Q. Yes. And about how high was it?

A. I would judge 2½ feet or possibly 3 feet.

Q. Now, after the body was taken on the sidewalk what did you and Mr. James and Mr. Pemberton do?

A. We walked in the house, Mr. James, into the front room and he was crying.

Mr. Parson: May I have that answer?

(Answer read by the reporter.)

By Mr. Williams:

Q. Was there any conversation at that time?

A. He kept saying, "Oh, I am so sick", and "What will I do without her?"

Q. And after that, then what happened?

A. Well, Mr. Pemberton took Mr. James' car and went to get a policeman or someone to assist, and he found a

radio police car and brought them back, and later a doctor came and gave Mr. James something for his stomach.

[fol. 26] Q. And then what next happened?

A. We stopped there for I don't know how long. He was a long while out in the swing out on the front porch. I imagine it was until 10:00 or later before they said we wasn't needed there, and we could go home, so I went to my apartment, and Mr. James and Mr. Pemberton went with me.

Q. Now, Mrs. Pemberton, when you were looking there in the house, about the house for Mary, before discovering her body, did you see anybody open the front door?

A. I don't remember. I know the front door was open, but to see it being opened at the time, I can't remember that exactly.

Q. Did you see Mr. James at or near the front door of the house?

A. Yes, sir.

Q. And by "the front door", Mrs. Pemberton, I refer to the door indicated at the southerly end of the living room, between the living room and the front porch?

A. Yes, sir.

Mr. Clark: If your Honor please, at this time may I suggest that the last three questions are rather more leading than they should be. I don't propose objecting at this time, but I want to direct counsel's attention to it.

Mr. Williams: I will try to avoid leading the witness.

The Court: All right.

By Mr. Williams:

Q. Now, what, if anything, did you see Mr. James do [fol. 27] at or near the front door?

The Court: Just a minute. May we have the question read. I don't know whether you said what you intended to.

(Question read by the reporter.)

The Court: Oh, I misunderstood you.

A. He just stooped and was picking up a note.

By Mr. Williams:

Q. Did you see the note?

A. Yes, sir.

Q. And did you read it at that time?

A. I don't know if I read it, or he read it out loud.

Q. I will show you now a brown piece of paper with some handwriting on it, and ask you whether you recognize that?

A. Yes, I do.

Q. What is that?

A. A note from Ethel——

Q. Never mind what it is from. Is that the note that Mr. James picked up at that time, that you saw?

A. Yes.

Mr. Williams: We ask that this be marked People's Exhibit No. 3 for identification at this time, if your Honor please.

The Court: It will be so marked.

By Mr. Williams:

Q. Did you see any other writing in the house?

A. Yes.

Q. When did you see that?

A. After the officers came, and we were looking around to [fol. 28] see if by any chance there would be a note, or anything written, and I walked into the dining room, and there was a little dish in the center of the table, and this letter was in the center of the dish.

Q. Was that in an envelope?

A. Yes, a sealed envelope, no stamp on it, but addressed to her sister in Nevada.

Q. Did you open it?

A. Yes, I did.

Q. Did you read it?

A. Yes, sir.

Q. I will now show you a grayish-blue envelope, and a letter, and ask you to examine both of those, and state whether they are the envelope and its enclosure which you found in the dining room?

A. Yes, they are the same.

Q. Did you have any conversation with Mr. James with reference to this particular note?

Mr. Clark: Just one moment. That is objected to upon the ground that it is immaterial, and no foundation laid. While the question may be preliminary, I prefer to make the objection now that the statements or declarations of

Mr. James are not admissible until the corpus delicti is established.

The Court: That objection will be overruled upon the ground it does not disclose the ground of the objection. [fols. 29-31] Mr. Williams: May we have the question, Mr. O'Brien?

(Question read by the reporter.)

Mr. Clark: May I ask that the witness be instructed to answer the question categorically?

The Court: Yes.

Mr. Williams: Just answer that "yes" or "no", Mrs. Pemberton.

A. Yes.

Q. What was the conversation?

• • • • • • •

[fol. 32] A. He instructed me to open the letter.

Q. All right. Tell us about the conversation, if any?

[fol. 33] A. The only conversation was that I was instructed to open the letter, and I read the letter, and the officers stood next to me at the time.

Q. Did you read the letter out loud?

A. Yes, sir.

[fol. 34] Q. You had known Mary Busch for about what length of time?

A. A little better than two years. I met her in about the month of October, 1933.

Q. And during that time how frequently did you see her?

A. When I first met her I would see her about every two weeks. She was the beauty operator that did my hair, and gave me my manicures.

Q. After that did you see her more frequently?

A. We lived together.

Q. For how long did you live together?

A. About two months.

Q. During that period of time did you, from time to time, observe her writing her name, and other things?

A. Yes, sir.

[fol. 35] Q. Now, I have in my possession here three cards containing some writing in pencil. I will ask you whether you have seen those cards before?

A. I have.

Q. And did you see the pencil writing put upon those cards?

A. Yes, sir.

Q. Was it put on in your presence?

A. Yes, it was.

Q. By whom?

A. By Mary Busch.

Q. And Mary Busch is the lady who later became Mary James?

A. Yes.

Q. And the lady whose body you saw on the 5th of August, as you described?

A. Yes.

Mr. Williams: We ask, if your Honor please, that these three cards, as one exhibit, be received in evidence at this time as exemplars.

Mr. Clark: Just one moment.

The Court: Just a minute, Mr. Clark. Do you think it would be preferable to have them as one exhibit, or three exhibits?

Mr. Williams: I think as one exhibit would be satisfactory, your Honor.

[fol. 36] The Court: They may be marked Exhibit 5 for identification at this time.

Mr. Williams: That will be No. 5, will it?

The Court: Yes.

By Mr. Williams:

Q. When you saw the body of Mary James did you observe how it was dressed?

A. Yes, sir.

[fol. 37] Q. How?

A. She had a pair of wash pajamas and bedroom slippers.

Q. Can you tell us something of the color or general appearance of the pajamas?

A. It was an orchid flower design with yellow trim, a big yellow organdie bow and yellow bows at the bottom of the leg of the pajamas.

Q. I will now show you a picture which I will ask his Honor to mark People's Exhibit No. 6 for identification.

The Court: 6 for identification.

By Mr. Williams:

Q. And ask you to state whether or not that is a picture of any person whom you know?

A. That is Mary's body. Her face is terribly swollen.

Q. You recognize it, however, as the body of Mary James?

A. Yes, sir.

Mr. Williams: This will be 6 for identification. You may cross examine.

Cross-examination.

By Mr. Silverman:

Q. Mrs. Pemberton, you have known both Mary and Mr. James——

The Court: Mr. Silverman, might I suggest, so that we won't have any confusion hereafter, the Court prefers to have counsel remain at counsel table while the witness is being examined. To have counsel perambulating around the court room creates confusion and distracts the attention of the jury.

[fol. 38] Mr. Silverman: I purposely came over there so that she would speak louder, your Honor, and for no other purpose.

The Court: I think you are just as far from her at the counsel table as you would be there.

By Mr. Silverman:

Q. You have known both Mary and Bob James for a number of years, haven't you?

A. Mr. James for about a year, but Mary, longer than that.

Q. And you and Mary were close friends?

A. Yes, sir.

Q. You worked together and lived together at one time, didn't you?

A. Not worked, but lived together. She was a beauty operator.

Q. How long did you live with Mary in the apartment?

A. About three months.

Q. And then about what time did you meet Mr. James, the defendant?

A. I don't know the exact date; it was just before Mary went down to the beauty shop, some time in May.

Q. And that was about four or five months before Mr. James and Mary were married, isn't that right?

A. Yes.

Q. Then during that time, between that time and the death of Mary, you saw Mr. James quite often, didn't you?

A. Yes.

Q. And you were close friends and saw each other several [fol. 39] times a week?

A. Yes, sir.

Q. Did you have occasion to observe the conduct of Mr. James and his wife, Mary, before they were married? I mean, with relation to friendship, love and affection?

Mr. Williams: That is objected to as not proper cross examination, irrelevant, incompetent and immaterial.

The Court: Overruled.

The Witness: Answer?

The Court: You may answer.

A. Well, I wasn't with the two of them so very much.

The Court: Well, did they appear to be loving, that explains the question, before they were married?

A. Well, I would say yes.

By Mr. Silverman:

Q. And they were together a good deal of the time before their marriage, weren't they?

A. Yes, sir.

Q. Then, on the 4th day of August, 1935, did you see Mr. James? That was on Sunday.

A. Sunday? No, sir.

Q. Did you see Mrs. James at that time?

A. No, sir.

Q. Did you see either Mr. or Mrs. James on the 3rd day, which would have been Saturday?

A. No, sir.

Q. When did you see Mary James and Bob James before [fol. 40] the 5th day of August, 1935?

A. It was the Wednesday before, but the date, I wouldn't know.

Q Well, it was the Wednesday before that Monday that she passed away, either on Sunday or Monday?

A. Yes.

Q. And what was the occasion of your seeing her then? Did you have an appointment with her or did you just go to visit her as she came to visit you?

A. No, we went out to the place to visit her.

Q. You went out to the place to visit her?

A. Yes.

Q. Was that at night or during the daytime?

A. It was at night.

Q. Was Mr. James there?

A. Yes, sir.

Q. Was there any discussion there as to your marriage with Mr. Pemberton?

Mr. Williams: That is objected to as not proper cross examination.

The Court: Sustained.

By Mr. Silverman:

Q. Now, there was some talk with reference to your marriage?

A. There was.

Mr. Williams: Objected to on the same ground.

The Court: Objection sustained, the answer is stricken. [fol. 41] It appears to be neither material or cross examination.

Mr. Silverman: I am leading up to a fact, if the Court please, and I submit——

The Court: You are going outside of the cross-examination. This witness's testimony started on the 5th of August. I permitted you to go beyond that on a question of the relationship of the deceased and her husband, but that is the extent of the Court's ruling so far.

By Mr. Silverman:

Q. Now, Mrs. Pemberton, on the 5th of August, that was Monday, you had an appointment to have dinner with Mr. and Mrs. James, didn't you?

A. It was not definite. We was going to have dinner together, but whether it was at my place or out at La Canada, that was left until Mr. James was to call me and let me know which it would be.

Q. And that appointment, whether it was definite or not, was made Wednesday when you last saw her alive?

A. Yes, sir.

Q. And with that in view, you spoke with Mr. James over the telephone Monday afternoon, was it?

A. Yes, sir.

Q. And for that purpose of going out there and having dinner with them you and Mr. Pemberton went out there?

A. Yes, sir.

Q. And as you stated, on your way out there, you bought steaks, and other things, to have dinner?

[fol. 42] A. Yes, sir.

Q. To prepare for dinner?

A. Yes, sir.

Q. And now when you saw Mr. James before you went out there, you met him, I understand, in front of the Telephone Company office where you were working at the time?

A. Yes, sir.

Q. How did Mr. James look? Did he look any different than he did, or show any different actions than he did before on any other time that you had seen him?

A. No, sir, I didn't notice any difference in him.

Q. He was the same as he was at any other time?

A. Yes, sir.

Q. Then whose care did you get into? You drove down there in a car, I understand?

A. Mr. James drove.

Q. On the way did you stop to buy some meat and things that you needed?

A. Yes.

Q. Who went out to get the meat?

A. Mr. James did.

Q. You and Mr. Pemberton remained in the car?

A. Yes, sir.

Q. And then when you got the meat you drove on to the house at La Canada, the house which is depicted on the [fol. 43] blackboard?

A. Yes.

Q. And you got there about a quarter past eight?

A. I imagine about that time. I didn't look at my watch.

Q. Approximately that time?

A. Yes.

Q. When you got to the house, who got out of the car first?

A. Mr. James walked in the house first. I was sitting in the middle and I was the last one to get out of the car.

Q. But you followed each other in the house, isn't that right?

A. Yes, sir.

Q. Mr. James came in the house and was the door locked or unlocked?

A. Unlocked.

Q. And you walked right in and the house was dark?

A. Yes, sir.

Q. And you made some light there so that you could see about the house?

A. Yes.

Q. And did you proceed to call for Mary?

A. Yes, sir.

Q. And Mary didn't answer?

A. No.

Q. And you went in search for Mary, is that right?

[fol. 44] A. That is right.

Q. Then the grounds I assume were dark, too, weren't they?

A. Yes.

Q. And you had a light struck by means of a searchlight?

A. Two flashlights.

Q. Who got the flashlights?

A. Mr. James got them.

Q. Did Mr. Pemberton, your husband, have a flashlight also?

A. Mr. James handed one to him.

Q. And you went out to look around the grounds to see if you could find Mary?

A. The two men went out.

Q. And you stayed in the house?

A. For a few minutes.

Q. What did you do while you were in the house, just sat down there?

A. No, I went in the one bedroom to find a pair of her bedroom slippers and I couldn't find any in that bedroom and I walked to the other bedroom.

Q. You knew Mary was sick for some period?

A. Yes.

Q. And did Mary tell you what was the matter with her?

Mr. Williams: Objected to as not proper cross-examination.

The Court: Sustained.

By Mr. Silverman:

Q. And then did you follow Mr. James and Mr. Pemberton [fol. 45] out in the yard?

A. When Mr. Pemberton called I went out.

Q. And Mr. Pemberton went out one way and Mr. James another, or did they both go together?

A. I didn't see either one walk out of the door; I don't know, because I walked to the bedroom to put on my slippers and I didn't notice them.

Mr. Silverman: May I have the last answer, Mr. Reporter?

(Answer read by the reporter.)

Q. Then Mr. Pemberton—you weren't married at that time, of course, were you?

A. No.

Q. You were married later on?

A. Yes.

Q. When you heard Mr. Pemberton's voice calling you came out of the house?

A. Not at first. The first remark he made I did not. It was after he called Bob, by that time I had my oxfords off and the slippers on and I ran out of the house.

Q. And you saw the body?

A. Yes, I did.

Q. And now, during the last six or seven weeks or eight weeks before the death of Mary, you had occasion to observe Mary's health?

* * * * * * *

[fol. 46] Mrs. James Pemberton resumed the stand and testified as follows:

Mr. Silverman: Will you read the last question, please?

The Reporter: The other reporter has it.

Mr. Silverman: That is all right.

[fol. 47] Cross-examination (Continued).

By Mr. Silverman:

Q. Now, Mrs. Pemberton, after you followed your husband out to where the body was lying, how close did you come to where the body was lying?

A. Close to the end of the pond.

Q. Close enough so that you could observe the body?

A. Yes, sir.

Q. And have you indicated exhibit—What exhibit is it?

Mr. Williams: Exhibit No. 1.

By Mr. Silverman:

Q. Have you indicated where you made the mark here, that was right on the edge of the fish pond, is that right?

A. Yes.

Q. And did you see the position of the body? Can you describe the position of the body as you saw it?

A. Well, I don't know whether her arm was in the water or just up close to the body.

Q. And you cannot tell the position of her arm, can you?

A. No.

Q. Can you tell what the position of her legs were?

A. Yes, straightened out, like that.

Q Did it have the appearance of her having fallen over that net?

Mr. Williams: That is objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

[fol. 48] By Mr. Silverman:

Q. She was leaning over the net?

A. Yes, sir.

The Court: Might I suggest that counsel has used the word "net". There was nothing in the record about a net.

Mr. Silverman: I understood there was a net, or a screen.

The Court: The word "net" was not used.

Mr. Silverman: "Screen", then. That is what I meant, anyway.

Q. Now, what part of her body was lying over the screen?
A. The upper part.
Q. Above her breast, or——
A. I was too excited to know that definitely.
Q. And her head was partly in the water, is that right?
A. It was in the water. All you could see was her hair floating.
Q. And with the exception of the hair, the rest of the head was submerged in the water?
A. Yes, sir.
Q. Was she lying on her stomach, or back, or side?
A. Her breast is just about the part where the curb would be on the pond.
Q. Did you have occasion to observe the water in the pond?
A. No, I don't know the depth of it.
Q. How many inches would you say, or feet, was there between her face and the bottom of the pond?
[fol. 49] A. I wouldn't know, not knowing the depth of the water.
Q. Well, that is about as much as you can tell us, as to the position of her body, is that right?
A. Yes, sir.
Q. Now, then, did the body remain there until the police arrived?
A. It was taken from the water, but left laying there, on her back.
Q. Who took her from the water?
A. Mr. Pemberton and Mr. James—I don't know how much help he was, trying to help get her out of the water.

Q. What do you mean by that?

The Court: You didn't see how much help he was?

A. No.

By Mr. Silverman:

Q. Is that what you want to say?
A. Yes, sir. Mr. Pemberton did most of it, because he said that the shoulders were wet, and his hands seemed to slip off.
Q. Well, Mr. James did assist, didn't he?
A. Yes.

Q. And the body was allowed to remain out of the water by the side of the pond?

A. Yes.

Q. Until the police officers came?

A. Yes, sir.

Q. And were you there when the police officers arrived?

[fol. 50] A. Yes.

Q. Did they go out and view the body?

A. Yes.

Q. And they moved the body?

A. I believe so. I didn't go with them. I stayed on the front porch with Mr. James.

Q. A little louder?

A. I stayed on the front porch with Mr. James.

Q. And what was the condition of Mr. James' mind and health at the time, his demeanor, while you were there on the porch?

The Court: Just a moment. That question is compound, and also is not a competent question.

Mr. Williams: We object to that——

Mr. Silverman: Well, I withdraw that question.

Q. Can you state how Mr. James acted while he was with you on the porch?

A. He was crying, and very sick to his stomach, and he was very warm. I was so cold that I was going in to get a blanket, or something, to put about me.

Q. And that condition continued for how long a period?

A. It wasn't very much, and he just said that he could not get along that way, and how sick he was.

Q. Well, how long did that continue, how many days and nights?

A. Oh, that evening.

[fol. 51] Q. That evening?

A. Yes.

Q. Then when the officers came, shortly after that, did you leave the place?

A. We stayed until they told us we could go. They had not taken Mary away then.

Q. Did you see them take her away?

A. No, sir, we were on our way to Los Angeles.

Q. And you were accompanied by Mr. James and Mr. Pemberton?

A. Yes, sir.

Q. And where did you go?
A. To my apartment.
Q. Did Mr. James accompany you?
A. Yes, sir.
Q. Did he remain there?
A. Yes, sir.
Q. And how long was Mr. James with you in your apartment?

Mr. Williams: That is objected to as not proper cross examination, and immaterial.
The Court: Objection sustained.
Mr. Silverman: Did Mr. James remain there for any period?
The Court: The objection was sustained to that question, Mr. Silverman.

By Mr. Silverman:

Q. Now, when you first came to this place where Mr. and Mrs. James were living, did you observe a note about the [fols. 52-53] premises, on the door outside, or on the premises not inside the house?
A. I saw this note with Ethel's signature on it.

Mr. Williams: Referring to People's Exhibit 3 for identification.
Mr. Silverman: And that, you know, is the note that Ethel wrote?

A. I didn't see her write it, but I knew she wrote it. Mr. James picked it up.
Q. Did he read it?
A. Yes, sir, he read it.
Q. That was before you went in the house?
A. No, we were in the house.
Q. You were in the house at the time?
A. Yes.
Q. Had you already known of the death of Mrs. James?
A. No, that was before we knew.
Q. Before you knew?
A. Yes, sir.
Q. But Mr. James made no remark of that note in your presence?
A. He made a remark about it, that the note was put there Monday.

. . . . . .

[fol. 54] JAMES PEMBERTON, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.
A. James Pemberton.

Direct examination.

By Mr. Williams:

Q. Mr. Pemberton, do you know Mary James—you knew her in her lifetime, did you?
A. Yes.
Q. And you knew the defendant, known to you as Robert L. James?
A. Yes, sir.
Q. Approximately how long did you know the defendant?
A. Since May of 1935.
Q. And how long did you know Mrs. James?
[fol. 55] A. Approximately the same time. I met them both together.
Q. Now, do you recall having met the defendant in Los Angeles on the 5th day of August, 1935?
A. I do.
Q. When and where did you meet him?
A. Well, he came out to the apartment at 6th and Coronado——
Q. And were you there?
A. Yes.
Q. Was anybody else there?
A. No.
Q. From that point did you and Mr. Jones go someplace?
A. Yes, we went over to the telephone office on Drexel—at the Drexel office there, between 7th and 8th.
Q. And did you meet anybody there?
A. Yes, I met my wife.
Q. She was at that time with Miss Lueck?
A. Correct.
Q. And from that place did the three of you go someplace?
A. Yes, we went to La Canada.
Q. And to what place?
A. 1329 Verdugo Road.
Q. To the James house?
A. Yes, sir.

Q. You had been there before, had you?

A. Yes, sir.

[fol. 56] Q. When you got there, was the car driven into the driveway?

A. Yes, sir.

Q. In the back of the house?

A. Yes, sir.

Q. And did you and Mr. James and Mrs. Pemberton enter the house?

A. Yes.

Q. By what method?

A. We entered by the back door.

Q. And what did you observe as to whether or not there were any lights on?

A. There were no lights. I believe there was some question as to why the house was dark.

Q. Now, state, if you know, what happened after the time that you arrived at the house?

A. I went into the house, through the back door into the kitchen, and there were no lights on, and we turned the lights on as we went, and I think my wife and Mrs. James were both calling for his wife, Mrs. James, and there was no answer, and the house was dark, so we went through all the rooms, and as we went to open up the front door to see if there was any one on the porch, he found a note, stating that some one had been there that day, or the day before. There was no way of telling when it had been left there. Mr. James picked up the note, if I remember rightly, [fol. 57] and read it to us, before we went out on the porch, and there was no sign of Mrs. James on the porch. And we had not—Mr. James at the time we were there the week——

Q. Never mind what happened the week before.

A. I am trying to lead up to something there.

Q. Well, just tell what happened at this particular time.

A. Well, from a former conversation——

Q. Just a moment. Leave out the former conversation.

The Court: Just tell what you did.

By Mr. Williams:

Q. Leave out the former conversation, and state what Mr. James did, and what Mrs. Pemberton did.

A. Well, because we all thought——

Q. Do not tell that. Just tell what you did. I might say that witnesses are not *pre*mitted to think.

Mr. Clark: Witnesses are not permitted, and lawyers haven't the ability.

The Court: That is an assumption that we can count on.

Mr. Clark: Thank you, your Honor, for that.

The Court: You may proceed.

A. We went to look where—there was a possibility that she might have fainted——

Mr. Williams: Just a minute. We move to strike that out.

Mr. Clark: Well, I think the entire matter is competent.

The Court: I was interrupted, and did not hear counsel.

Mr. Clark: The witness replied "there was a possibility that she may have fainted."

[fol. 58] The Court: That will be stricken.

By Mr. Williams:

Q. Just tell us what you did.

A. We started out to look for her.

Q. Did you have any light?

A. No—Mr. James got some flashlight to look for her. After we looked through the house, why, he suggested to get some lights and look outside, and so we got the light, and he went out in the back of the house, and I went around in front of the house. I was familiar with the front grounds of the house, and I had not been in the back of the house. And I went around through the front yard, and looked all over the front yard. The yard is fairly ample. In coming back on the west side of the house there is a shrubbery in there, and it leads—there is a little walk that leads through the shrubbery and alongside the fish pond.

Q. By the fish pond?

A. And as I walked through I found Mrs. James' body there.

Q. Well, describe the position of the body.

A. Her head was in the water. Her head was—I imagine there was a portion of her shoulders in the water, and one of her arms—her right arm, I believe, was folded underneath her, and her left arm was laying at her side. And [fol. 59] her feet were straight—as near as I can remember now, her feet were straight out across the walk behind.

Q. Was she lying on her face or on her back?

A. She was on her face.

Q. Directly on her face, would you say?

A. Well, she had her left arm under her body, lifted her shoulder, but her face was in the water. She was faced down in the water.

Q. Was her entire head covered by the water?

A. I couldn't state definitely as to that. I noticed the hair floating in the water and I couldn't say definitely whether her head was completely covered or not.

Q. What did you do when you saw her body there?

A. I made an exclamation at the time. Then I got up and went around the back. I called Mr. James and went around to the back of the house to meet him to try to keep him from coming around there and it was a somewhat gruesome spectacle and I didn't think that——

Q. What did you say to Mr. James?

Mr. Silverman: Let him finish the answer, please.

The Court: I think what the witness was saying was not competent. I think the witness was properly stopped. Proceed.

A. As nearly as I can remember now I told him to brace up. I told him he had a shock. I told him Mrs. James was dead.

By Mr. Williams:

Q. Then what did you and James do?

A. Mr. James, I tried to keep him from going around to [fol. 60] the fish pond, but he was determined to go around there. I went around with him. He kneeled down beside Mary, Mrs. James, and he tried to lift her back; he tried to lift her out of the water. He didn't seem to be able to do any good, and I got down and got hold of him and her shoulder and I pulled her back just so her head was out of the water, pulled her back towards the walk, and finally I got him up and around the house. My wife had come out in the meantime, and she was standing right there and I told her to take him in the house and from then on I got into the car and first I went up to the "Y" of the road and I couldn't find a telephone there so I turned and went down to the Sheriff's office in Montrose and there was a police officer there that called the radio car.

Q. Now, let's get back to the position of the body. Where would you say the hips were with reference to the curbstone which runs around the fish pond?

A. Well, her hips would be somewhere towards the middle of the walk or a little to the side, towards the fish pond, a little to the west side of the walk.

Q. How much of her body would you say was on the westerly side or the pond side of the curbstone?

A. Well, from pretty near half way up the trunk of her body—well, the center of the trunk of her body—would be lying over the stone parapet or the rock parapet around the pond.

[fol. 61] Q. Did you see a wire fence at the top of the fish pond there?

A. I did.

Q. Describe the position of the wire fence at or near where the body was.

A. The wire fence was mashed down underneath the body.

Q. Was that underneath the upper portion of the body?

A. Yes.

Q. And now, you saw the point which has been marked number 1 on People's 1 for identification, you see that there. I will ask you whether that fairly indicates about the general position of the body?

A. Well, I would say it was a little further north.

Q. Well, now, we will get a pencil, and will you mark it? I will hand you a blue pencil and bearing in mind, Mr. Pemberton, that one inch on this map is equivalent to about two feet, and bearing in mind the size of Mary, try to indicate as nearly as you can the general size and position of her body as it lay there as you saw it that night.

A. I will just mark this with an oblong.

Q. Yes.

A. I am not very good at drawing.

Mr. Williams: You have now marked what isn't an oblong, but is generally the shape of a body. May I mark it a little more heavily, your Honor?

The Court: Yes, and also number it "2" while you are at it.

[fol. 62] Mr. Williams: This will be number 2. And the head in which direction?

A. The head is slightly toward the north.

The Court: Towards the center of the pond?

A. Yes, towards the center of the pond.

Mr. Williams: That is in a general north westerly direction?

A. Yes.
Q. And the feet in a general south easterly direction?
A. Yes, sir.
Q. Was she alive or dead at the time you picked her up?
A. She was dead.
Q. Did you observe how she was dressed?
A. Well, I would not say I observed her at the time, because I wasn't sure of it. I was at a later period but that would not be of any interest here to you.

The Court: Do you mean that you had a better opportunity later on to observe the clothing that she had on?

A. No, but I just happened to know the pajamas that she had on at the time, although it didn't enter my mind as to what her clothing was.

The Court: I see.

A. I could not have stated definitely at the time whether it was pajamas or whether it was a dress.

Mr. Williams: I will now show you a picture and ask you to examine that and state whether that picture is a picture of any thing that you saw out there that night.

[fol. 63] A. It is.
Q. What is this a picture of?
A. That is the picture of the fish pond.
Q. That picture shows which side of the pond?
A. That picture shows the east side of the pond, the side towards the house.
Q. Does that include the portion of the pond in which her body was lying at the time that you got out there?
A. That is correct.

Mr. Clark: Mr. Williams, will you oblige us by telling us when the pictures were taken?
Mr. Williams: These pictures were taken sometime in May.
Mr. Clark: Of this year?

Mr. Williams: Of this year.
Mr. Clark: Thank you.

By Mr. Williams:

Q. Is this a correct representation of the fish pond and the surroundings so far as they appear in the picture, as they appeared at that time?
A. So far as I can remember, yes.

Mr. Williams: We offer this in evidence, if your Honor please.
Mr. Clark: To which we object.
Mr. Williams: I have already shown these to counsel.
Mr. Clark: We have seen them, but I object on the ground that they are incompetent, in that it is not shown that they were taken at or near the time of the death of Mrs. James, [fol. 64] nor has it been shown that the conditions have been changed in any material respect since that time.
The Court: The witness answered that it did represent it as he saw it.
Mr. Clark: But he didn't say that the conditions were the same.
The Court: Let me ask the witness one question. Mr. Pemberton, having seen that photograph, does that fairly represent the appearance of the fish pond as it existed on the 5th of August of last year?
Mr. Clark: Just a minute; I will have to object to your Honor's question.
The Court: Of course, you are privileged to object to the Court's question.
Mr. Clark: On the ground it calls for incompetent evidence and an opinion that it is not shown that the witness is competent to express. If I may ask the witness two or three questions.
The Court: Go ahead.

By Mr. Clark:

Q. Mr. Pemberton, directing your attention to the photograph and at the same time to your recollection of the shrubbery there, these photographs show a great deal taller shrubbery than you saw there last August, don't they?
A. Well, I would imagine they would, yes.

The Court: Not your imagination, Mr. Pemberton, but your recollection.

[fol. 65] A. I would not state definitely as to that. I never paid particular attention.

Mr. Clark: That is the point, your Honor.

The Court: The objection will be overruled. It will be marked in evidence as 7.

Mr. Williams: This will be number 7, your Honor?

The Court: It will be number 7. Suppose you mark the number on the back in red, Mr. Williams, as we proceed along with the pictures.

Mr. Williams: I have just done that. I show you another picture purporting to be a picture of the pond, and ask you whether that is a fair representation of another portion of that pond as it appeared on and about August 5th, 1935?

A. Yes.

Q. Are you able to state from looking at that picture what portion of the pond it represents?

A. Yes, that represents the south east portion—or rather the north east.

Q. The north east portion of the pond?

A. Yes.

Mr. Williams: May this be received in evidence?

Mr. Clark: To which we object on the ground that it is incompetent and that no foundation has been laid for its introduction, in that it has not been shown that the conditions depicted by it, and particularly the shrubbery shown upon it, are in the same condition that they were at the time [fol. 66] alleged in the indictment.

The Court: The objection will be overruled. Mark it 8 in evidence.

By Mr. Williams:

Q. I will show you a third picture taken from a different angle of what appears to be the same pond, and ask you whether or not that is a correct representation of that pond and its immediate surroundings as you remember them to have appeared on the 5th of August and during that period in 1935?

A. Yes.

Q. This shows the entire pond?

A. That shows the entire pond.

Mr. Williams: We offer this in evidence, if your Honor please.

Mr. Clark: To which we object upon the same grounds as we stated to the last offer, your Honor.

The Court: Objection overruled. Mark it 9 in evidence.

Mr. Williams: Now, if your Honor please, may I at this time show these three pictures to the jurors?

The Court: You may do so.

Mr. Williams: I think it will be of some assistance to them. I am showing the jury now Exhibits 7, 8 and 9.

The Court: I think we will take our recess after the jury has seen the photographs, before going into any further testimony.

Mr. Williams: If your Honor please, a juror has just [fol. 67] asked me a question.

The Court: Will you just ask the question out loud, please?

The Juror: This coping of the fish pond, it doesn't show any netting that the body was supposed to lay on.

The Court: That will be cleared out undoubtedly by the testimony of the witnesses. We will take our recess at this time. The jury will heed the admonition heretofore given. I will ask that all persons remain seated until the jury has left the courtroom.

(Whereupon an adjournment was taken until 2 o'clock P. M.)

[fol. 68] Wednesday, June 24th, 1936; Afternoon Session, 2 o'Clock P. M.

The Court: The record may show all parties present. You may proceed, Mr. Williams.

James Pemberton resumed the stand and testified as follows:

Mr. Clark: Were you through, Mr. Williams?

Mr. Williams: No, I hadn't finished.

Direct examination (Continued).

By Mr. Williams:

Q. I refer you again to People's Exhibits 7, 8 and 9, being several pictures of the fish pond, and I direct your atten-

tion to the fact that there is no wire at or about that pond shown in the pictures. Was there a wire about the pond on the night that you discovered Mary James' body?

A. There was.

Q. And I direct your attention to a coil of wire which appears in the court room here, and ask you whether that wire appears to be similar in its general appearance to that which was around the pond at the time you discovered the body?

Mr. Clark: That is objected to on the ground that it is wholly incompetent, irrelevant and immaterial.

The Court: Overruled.

A. It was.

[fol. 69] Mr. Williams: May I at this time ask that this wire be marked for identifidation as People's Exhibit 10 for identification?

The Court: People's Exhibit 10.

Mr. Clark: May I ask if that is the same wire?

Mr. Williams: Yes, it is.

Mr. Clark: Have you knowledge of that?

Mr. Williams: No, I only have witnesses who will so testify.

Mr. Clark: Very well, Mr. Williams, pardon the interruption.

The Court: Mark it 10 for identification.

By Mr. Williams:

Q. I show you People's Exhibit No. 3 for identification and ask you to examine that and ask you to state whether or not you have seen that before?

A. Yes.

Q. When and where?

A. It was the note that Mr. James picked up on the 5th of August at his home.

Mr. Williams: You may cross examine.

Cross-examination.

By Mr. Clark:

Q. Mr. Pemberton, first, I am going to ask you to take your time, to be sure you understand the questions. If you

don't understand them, indicate that, and after you have understood and had sufficient time, to answer them as [fol. 70] directly as possible. You will do that, won't you?

A. Yes.

Q. And now, around what time in the evening upon this day that you identify as the 5th of August was it that you saw Mr. James, as nearly as you can fix the hour?

A. Well, I could not answer that definitely, because there is quite a time elapsed since that. I think it was somewhere around a quarter of 6:00, if I remember rightly, or a quarter after; I forget which.

Q. And when you saw him on that occasion he came to some place where you were, is that correct?

A. Yes sir, correct.

Q. I assume then that you met him pursuant to some appointment, is that also correct?

A. That is correct.

Q. The fact is that you had a dinner engagement to eat dinner at his house that evening, you and the lady who is now your wife, is that the situation?

A. Correct.

Q. Now, when you first saw Mr. James upon that occasion did you notice anything in his manner or demeanor that was different from the manner and demeanor you had observed upon his part at other times?

A. No.

Q. And as I understand, he was driving a car at that time when you saw him?

[fol. 71] A. That is correct.

Q. Did he get out of the car and knock, or did you come to the car while he was seated in it?

A. Well, I don't remember just exactly the circumstances of that.

Q. Very well, Mr. Pemberton, we will pass to something else. At any rate, you entered the car and rode with him for some considerable distance before you met Mrs. Pemberton, didn't you?

A. No, the distance was only about three blocks, I guess, two or three blocks.

Q. And in riding those two or three blocks, were you riding in the driver's seat or in the tonneau, that is in the front seat or the tonneau of the car?

A. I was in the front seat.

Q. And now, sitting there by Mr. James in that front seat, did he appear any more pale than he does now?

A. No.

Q. Did you notice any trembling of his hands or his body?

A. No.

Q. Did he appear to you at that time to be in any way depressed?

A. No.

Q. Then, as I get it you drove three blocks up and picked up Mrs. Pemberton?

A. That is correct.

[fol. 72] Q. And that was all here in the City of Los Angeles, I take it?

A. That is also correct.

Q. And you then had quite a little ride with him to this place on Verdugo Road, didn't you?

A. That is correct.

Q. That was a matter of some, should we say, 12 or 15 miles?

A. Yes.

Q. All of that, isn't it?

A. I imagine that is approximately it.

Q. And during all of that time you were engaged in casual conversation?

A. Yes.

Q. And Mr. James took part in that conversation with you and Mrs. Pemberton?

A. Yes, sir.

Q. He spoke and talked just as you were in the habit of seeing him talk?

A. Yes, sir.

Q. Now, did he drive directly to the house, or did he stop?

A. He stopped at a market on the way up there and made some purchases for the dinner.

Q. And purchases of things to eat?

A. Yes.

Q. When you reached the place, do you remember whether [fol. 73] the sun was still shining?

A. No, it was—well, it was just dusk. It wasn't really dark yet. It was dusk.

Q. Sort of between the dark and the daylight, is that the distinction?

A. Yes, sir.

Q. Lights were not lit, were they?

A. No, sir.

Q. It was still light enough that you could see objects distinctly around you?

A. No it was not.

Q. It was beginning to get a little dim?

A. Yes.

[fol. 74] Q. Now, was there any reason stated by Mr. James for entering the house from the rear?

A. None at all.

Q. Was that the only manner you had been accustomed to enter the house?

A. Yes.

Q. So there was nothing unusual about the way you went into the house?

A. Nothing at all.

Mr. Clark: Have you the exhibits?

Mr. Williams: Why, I have them right over here.

Mr. Clark: What about No. 10? It is over here. We can inspect that if we care to.

Q. Now, do you remember whether the door was locked, or unlocked, when you reached the house?

A. The door was unlocked.

Q. And the house was in darkness, I take it?

A. That is right.

Q. And do you remember whether the window blinds were down, or up?

A. No, I couldn't say as to that.

Q. You didn't notice that at the time?

A. No, sir.

Q. Do you remember if Mr. James took his bundles in when he went in the house, or did he leave them in the car?

A. I couldn't say.

[fol. 75] Q. In other words, you didn't pay much attention to that, did you?

A. Yes.

Q. What part of the house did you go into? I withdraw that question. This rear door, that you went to, gives access, if you know, to what room in the house, Mr. Pemberton?

A. It gives access to the kitchen, the porch first, and then the kitchen.

Q. Let us look at this map, that has been testified to as being a map drawn to scale, showing the house, and indicating the location of the different rooms. Do you so recognize it?

A. I do.

Q. Now, I notice a door here to a porch, which in turn has another door giving access to the kitchen. Is that the route you followed going into the house?

A. It is.

Q. When you got into the kitchen there were the lights turned on, or did the house remain in darkness?

A. I don't quite understand your question? Do you mean we turned the lights on?

Q. You or Mr. James. Were the lights turned on?

A. The lights were turned on.

Q. I presume that you probably don't distinctly remember whether it was Mr. James that turned them on?

[fol. 76] A. No, I don't.

Q. And after remaining in the kitchen some short interval of time, I presume that you proceeded to some other part of the house, is that right?

A. That is correct.

Q. I notice that the kitchen has two doors, one leading into a hall, and the other going directly into the dining room. Do you remember which route you pursued?

A. I couldn't tell you now, no.

Q. Well, you do remember, don't you, that within a short time after you reached there the lights had been snapped on in various rooms in the house?

A. Yes.

Q. And there had been somebody calling to Mrs. James, somebody had endeavored to attract her attention by the voice, hadn't there?

A. Yes, sir.

Q. By the way, it is your recollection that some one went all through the house before you made any search outside, isn't that true?

A. I think we all eventually went all through the house, but by what route, I couldn't tell you.

Q. Well, I think it is perhaps comparatively unimportant. Did you, yourself, go into the bathroom?

A. No.

Q. Do you know whether your wife did, or not?

[fol. 77] A. I couldn't tell you as to that.

Q. Were you in the bathroom at any later time that evening?

A. No.

Q. After going through the house and calling, and receiving no response, I understand—I don't think I need stand here any longer. Your Honor will pardon me. I didn't mean to stand close to the witness in interrogating him any further than was necessary. After having gone through the house and calling Mrs. James, some conference occurred in regard to making a further search, did there not?

A. That is correct.

Q. Now, without going into anything that might have been said at that conference, did you notice Mr. James' manner and demeanor at that time?

A. Not particularly, no.

Q. After conferring there whatever time you did confer, you got searchlights for the purpose of searching outside, you and Mr. James did, didn't you?

A. Yes.

Q. Two searchlights were all that were used on that occasion, were they?

A. That is right.

Q. Mrs. Pemberton, so far as you know, remained inside while you and Mr. James were searching on the outside, is that true?

[fol. 78] A. That is right.

Q. Now, I am afraid it is going to be necessary for me to stand over there by you again for a few minutes, Mr. Pemberton. I trust it doesn't annoy you. I am going to ask you if you would be kind enough—might I have the pointer, gentlemen? I am going to ask you if you would be kind enough to take a look at the other diagram, I believe People's Exhibit No. 2, that I am showing you now, the one that I first directed your attention to being Exhibit No. 1, I will ask you if you will kindly take the pointer, and be kind enough to point out as nearly as you can the route that you took in searching for Mrs. James.

[fol. 79] A. Well, I couldn't do that because the front yard on the map here is left out.

Q. Very well then, will you just tell the jury as nearly as you can what route you did take in making that search?

A. We both went out the back door, and I went down the driveway, along the east side of the house, towards the

front yard of the house, and went through the front yard. I believe I had only been in the back yard once when I had been out there previously, and so I went out through the front yard and went all through the front yard out there and as I came down around there is shrubbery all around the front yard, around the borders of the property, and I went and looked over the lawn and through the shrubbery there and came up on the west side of the house on the walk that leads to the fish pond.

Q. And then you followed that walk around to the pond?

A. That is correct.

Q. During the time that you were in front of the house did you see Mr. James' flashlight?

A. No.

Q. Do you know where he was during the time that you were making that part of the search?

A. No, I don't.

Q. Do you know where he was at the time that you first saw Mrs. James' body?

A. No, not when I first saw the body, I don't.

[fol. 80] Q. From what direction did he come? He did come to you when you found the body, didn't he?

A. That is correct.

Q. You remained in close proximity to the body until he arrived, didn't you?

A. That is correct.

Q. From what direction did he seem to come when he came there?

A. He came from the north through the gate from the back yard.

Q. Again I will direct your attention to the diagram, People's Exhibit No. 1 and to the space behind the right-hand portion of it designated as the driveway. Is that the driveway that you took in going around to the front of the property?

A. That is correct.

Q. And there is nothing upon either of the two diagrams upon the board that shows the shrubbery that you speak of in the front of the place, is there?

A. No.

Q. That shrubbery, however, as I understand, was planted some of it, along the foundation of the house, what we call the foundation planting, and the rest along the

borders of the property line so as to leave the lawn clear, is that the way it was planted?

A. There was some shrubbery in the lawn, small trees there.

[fol. 81] Q. Now, when you went around to the fish pond after you had covered the entire front of the property and took the little walk which is designated on Exhibit No. 2 as leading from the left, which I understand to be the west side of the house to the fish pond, is that correct?

A. That is correct.

Q. Now, there is a driveway on the property immediately to the east of the house, is there not? Do you remember that?

A. East?

Q. I think my question maybe is a little confusing. There is a house on the property east of the one where Mr. James is living, isn't there? There is not a vacant lot?

A. No, there is a house next door.

Q. There is a driveway leading into the premises there, isn't there?

A. Well, I couldn't tell you where it is.

Q. Isn't that driveway near the westerly boundary of that property?

A. I couldn't tell you as to that.

Q. Very well. Now, I refer again to Plaintiff's Exhibit No. 1. You had never been around the portion of the property north or back of the house but once before this particular night, had you?

A. Well, I went up in the back yard. I had been around the——

Q. The fish pond?

A. Yes, the north and the west of the house, but I had [fol. 82] only been out in the back yard, I believe, once.

Q. Now, taking People's Exhibit 2, I note that farther in the rear of the house there is a garage. Had you been as far as the garage on a number of occasions?

A. Yes.

Q. Now, I will ask you if it is not true that there are no trees or other obstacles to shut off the view of the fish pond from the property adjoining this on the east after you get past the house itself? Is that question quite clear to you?

A. Why yes, there is some shrubbery that grows along the borderline of the property, where it is designated on

your plan there, the shrubbery that goes between the hou e and the house next there.

Q. You mean the shrubbery intervening between the garage and the street on this property?

A. No, it is in between this house, 1329 and the first next house there, whatever it may be, to the east.

Q. But if we were to draw a line along the north edge of the house, there is no shrubbery or anything else north of that line to intercept the view of a person standing on the adjacent property, is there?

A. I believe there would be. I couldn't say definitely, but if my memory is correct, I believe there is.

Q. Now, still dwelling upon Exhibit No. 2, I direct your attention to a house designated on that exhibit other than [fol. 83] the house at 1329 Verdugo Road.

You are aware of the existence of a house at that place, are you not?

A. No, I was not.

Q. You have no knowledge, then, as to how the windows of that house were arranged?

A. Well, yes——

Q. Or how a person could see from that?

A. No.

Q. Well, at any rate, you do know that there was a chicken house somewhere near the north end of this property where Mr. James was living?

A. Yes.

Q. And you do know they kept chickens there up to the time of Mrs. James' death, do you not?

A. Yes.

Q. Now, I want to take up these photographs for a moment. By the way, did you have occasion to be around that fish pond quite a considerable number of times before her death?

[fol. 84] A. No, I think I was only out there once or twice.

Q. You never did pay any very close attention to the shrubbery and other objects in the rear of the house, did you?

A. No, I can't say that I did.

Q. Now, I want to show you for a moment Exhibit No. 7, and it will be necessary for me to stand by you. I will put the stick down. I want to direct your attention to the upper right-hand corner of the photograph. What you see there

you remember is the foliage of quite a large tree, isn't that true?

A. Yes.

Q. Now, that tree stands quite a little distance from the pond, does it not?

A. Well, I couldn't answer as to that, either.

Q. Well, you wouldn't be able to say that there is any tree there closer to the pond than the rear wall of this room, of this room where we are now?

A. I wouldn't say, because I am not positive of that.

Q. Now, I want to direct your attention to the photograph marked People's Exhibit No. 8, particularly to the portion of it which lies in the upper right-hand corner of it. You do remember that the shrubs that were planted there were of low growth, don't you, like century plants, and things up to 2 or 3 feet high?

A. Yes.

Q. Now, I notice somewhere straight at the extreme— [fol. 85] something that looks like an awning. It looks to me like an awning. Did you see an awning there?

A. No, I did not.

Q. Your best recollection is that there was no awning there at the time you were there that evening, is that correct?

A. Yes, sir.

Q. Now, there seems to be a corner of a building on which what I have described as an awning is fastened. Do you know what building is in conformity to that point?

A. What do you mean? What part of the house is that?

Q. Yes, what part of the house?

A. This part here?

Q. Yes.

A. That is the back bedroom.

Q. Now, that is the bedroom designated as lying immediately north of the living room on People's Exhibit No. 1, is it not?

A. No, but——

Q. Well, the bedroom here, the extreme northern one?

A. That is correct.

Q. Have you, yourself, ever been in that bedroom?

A. Yes.

Q. That bedroom had two windows on the western side, hadn't it?

A. I couldn't say as to that. I know that there is a window, or two windows; I couldn't say how many for sure. [fol. 86] Q. You can stand in the bedroom and look through the windows of that place, right to the place where you saw the body of Mrs. James, couldn't you?

A. That is correct.

Q. Have you ever been in the other bedroom that I spoke of first?

A. Yes.

Q. And the same thing is true there: you could stand in that bedroom and look right across to where you saw Mrs. James' body, couldn't you?

A. Yes, that is correct.

Q. Now, you cannot—before I leave this subject altogether—you cannot take these three photographs, or any of them, and say that the shrubbery is not shown there to be a great deal higher than it was in August, can you?

A. I couldn't say as to that, because I am not——

Q. Well, you never did pay any individual attention to the height of the shrubbery, enough to know that?

A. No.

Q. Have you been upon the property in the last two or three weeks?

A. No.

Q. Now, coming back to the events of that particular evening, you were using the flash at the time you found Mrs. James' body?

A. That is correct.

[fol. 87] Q. That furnished the only light which you had there on that day, that is, the only artificial light?

A. That is right.

Q. And by that time, except where there was artificial light, it had grown to be quite dark, ha*nd*'t it?

A. It had.

Q. What kind of a flashlight were you using, Mr. Pemberton?

A. I couldn't tell you.

Q. Well, did it give what you would call a pretty strong light, or not?

A. Well, it was not extra good, no.

Q. You wouldn't say it was as strong as we get from a 30-watt bulb, would you?

A. No.

Q. Even with that light you had a little difficulty in seeing what the position of her body was at first, did you not?

A. Well, I--it was just by chance that I saw the body. My light was turned across the fish pond on to the other side, and I pretty near stepped on the body before I saw it.

Q. When you first saw the body it was only a matter of four, or say three feet from you, is that right?

A. It was closer than that.

Q. It was closer than that?

A. It was right under my feet.

[fol. 88] Q. Right under your feet?

A. Yes, sir.

Q. Now, did you do anything with reference to her body as soon as you saw it?

A. No.

Q. The first thing you did was to call Mr. James, was it?

A. No, I made an exclamation of some kind before that.

Q. That was an exclamation by reason of the finding of the body?

A. Yes.

Q. And that exclamation was made before you had time to think?

A. Yes, sir.

Q. And then as you thought, you began calling Mr. James?

A. That is right?

Q. And did any considerable time elapse before Mr. James came, or was he there almost immediately?

A. Well, it was a very short interval of time. I couldn't say as to the time; it was a very, very short interval of time.

Q. That is all I expected you to remember, that it wasn't long enough to cause you to wonder what was detaining him, or anything of that sort.

A. No.

Q. And when he came up did he have his flashlight in his hand?

[fol. 89] A. That is right.

Q. And when he came up, do you remember the first thing that was said between you, whether you spoke to him, or he spoke to you?

A. I spoke to him.

Q. What did you say to him?

A. I told him to brace up.

Q. What was his manner at that time?

A. Well, I told him—at that time I told him that Mary was dead. I told him that Mrs. James was dead.

Q. When you told him that, how did he take it?

A. Well, it was considerable of a shock to him.

Q. How did he act?

A. Well, I am not——

Q. I know it is a little hard to describe. Just think a minute, and see if you can't tell us.

A. Well, I wouldn't be qualified to answer that, because I don't know. It appeared to me that he was very shocked.

Q. Did he seem to tremble?

A. Well, it is——

Q. You couldn't go into detail any more than you have?

A. No, I couldn't go into detail.

Q. Well, after showing him the body, did you and he do anything with relation to the body, or did you go away and leave it as you found it?

A. Well, he knealt down beside the body; Mr. James knelt [fol. 90] down beside the body, and he was talking to her, talking to the body. I don't know just what was said.

Q. Was he crying then?

A. Well, I couldn't say as to that. I was nervous and excited, myself. I didn't realize at the time what was happening.

Q. Do you remember any of the things that he said to her?

A. No, I don't.

Q. He told her how much he loved her, did he not?

A. I wouldn't say to that, because I don't knew.

Q. If I were to ask a number of questions that might be suggestive in the hope of refreshing your memory, you feel that your memory could not be refreshed, is that right?

A. My memory was pretty poor right then. My attention was pretty fixed right then; I couldn't remember that.

Q. Did Mrs. Pemberton come out and join you, or did you go to where she was?

A. No, she came out when Mr. James came out from the garden.

Q. Was she right beside you and Mr. James practically all the time that he was at the pond?

A. Yes, as nearly as I can remember she stood at the

northern end of the pond where the walk goes around the back of the house.

Q. Well, at any rate, the three of you, after some in-
[fol. 91] terval of time, left the pond and went into the house together, didn't you?

A. That is right.

Q. Did Mr. James require assistance to get into the house?

A. Yes, he did.

Q. Do you remember anything more about his appearance at that time than when the fact of the body being there was first made known to him?

A. If I understand your question——

Q. That is the time he was going into the house?

A. Will you restate that?

Q. Let me withdraw it and ask it again: At the time that Mr. James was going into the house, did you notice his manner or appearance then?

A. Well, after a manner I did, yes.

Q. Just tell us as much as you can describe of it.

A. Well, he was very much broken up. I believe he was crying at the time.

Q. You had hold of him, didn't you?

A. Yes, I had hold of him on one side.

Q. You had hold of his arm?

A. Yes.

Q. His knees seemed to give way beneath him, didn't they?

A. Well, he was very weak, yes.

Q. His arm trembled, didn't it?

[fol. 92] A. I couldn't say as to that.

Q. Tears were rolling down his cheeks, weren't they?

A. As nearly as I can remember, I think they were.

Q. He was making incoherent exclamations, wasn't he?

A. I can't remember as to that; I wouldn't say.

Q. Very well. Now, Mr. Pemberton, you testified at the Coroner's inquest on the body of Mrs. James, didn't you?

A. Yes.

Q. And you recollect that your testimony upon that occasion was given the very next day, wasn't it?

A. No.

Q. Or within a day or two, anyway?

A. No, it was—I don't know how long it was.

Q. I am in error. My associates called attention to the fact that the inquest was held about the 15th of August. Is that your recollection?

A. Yes, sir.

Q. At any rate, at that time your memory as to some of these details was fresher than it is now, wasn't it?

A. Yes, it must have been.

Q. And if I were to show you your transcript of the testimony given at that time, it might be of some assistance in refreshing your recollection, might it not?

A. It might help, yes.

Q. It might help you?

A. Yes.

[fol. 93] Mr. Clark: There is no question but that this is the transcript, is there gentlemen?

Mr. Barnes: No question.

By Mr. Clark:

Q. Now, I am going to ask you if you will be kind enough to read a portion of this transcript, on page 9, from line 22 to and including line 28, and let me know when you have done so.

[fol. 94] A. This is incorrect in a sense.

Q. Well, just tell me—we won't attempt to correct it, since it is not going to be used as evidence here now, but just tell me since you have looked at it, whether that does or does not refresh your recollection as to any of the circumstances of Mr. James' appearance, manner and conduct that evening? Just answer that "yes" or "no".

A. No.

Q. It does not?

A. No.

Q. And now after getting in the house, didn't Mr. James seem to be so weak that he appeared to be unable to stand?

A. No, he was sick and nauseated.

Q. He was nauseated before he got into the house, wasn't he?

A. Well, it was after he got into the house that I noticed more. But I didn't take much notice of it before.

Q. While I am on the subject I may as well bring it up I think. You saw him every day for quite a number of days after that, didn't you?

A. Yes, I——

Mr. Williams: That is objected to——

The Court: It is preliminary, Mr. Williams. I will permit the question.

A. I couldn't state definitely how many days.

By Mr. Clark:

Q. But for quite a few days you were with him every [fol. 95] day, isn't that correct?

Mr. Williams: Objected to as not proper cross examination.

The Court: You may answer that "yes" or "no".

A. Well, I don't quite understand the——

Mr. Clark: Let me get at it this way.

The Court: About how frequently did you see him, say during the two weeks immediately following the 5th day of August?

Mr. Clark: If your Honor will permit me to reframe the question now with the information I have.

Q. You saw him every day from that Monday until and including the Saturday following, didn't you, Mr. Pemberton?

A. No.

Q. How many times, according to your recollection did you see him that week?

A. Well, I wouldn't like to answer that definitely. It might have been—without checking back on it, I wouldn't know.

Q. Well, whatever number of times it was, you do remember that you saw him crying all during that week, don't you?

Mr. Williams: That is objected to as not proper cross examination and immaterial.

The Court: Objection sustained.

By Mr. Clark:

Q. Now, you saw no sign of illness on the part of Mr. James that evening until after the body was found, did you? [fol. 96] A. That is correct.

Q. There was a very great change in Mr. James, both in his manner and his appearance that took place as soon as the body was found, isn't that correct?

A. That is right.

Q. And that changed manner and appearance you observed at various future times during the week, didn't you?

Mr. Williams: That is objected to——

The Court: Objection sustained.

Mr. Clark: I think I understand your Honor's ruling now and I will not transgress.

The Court: It is the same as the prior ruling.

Mr. Clark: Yes, your Honor. I have a case in 145 California that I thought was in point. I just wanted to be sure that I understood the scope of your Honor's ruling.

Q. Now, directing your attention—You showed this Exhibit No. 4 to the witness, didn't you, Mr. Williams?

Mr. Williams: No, I didn't. I won't object on the ground that it is not proper cross examination, however, if you want to show it to him.

Mr. Clark: Well, I don't think it would be objectionable in either event, but I will get at it in a different way in one instance than I would in the other.

Q. After you got into the house, Mr. Pemberton, what, if anything, was done toward notifying the authorities?

A. Well, as soon as I had Mr. James in the house I went [fol. 97] out and got into his car and went after them.

Q. He was left in the house with your wife at the time?

A. Yes.

Q. By the way, you used his car, I believe?

A. That is correct.

Q. That is the same car that you drove up to the house in or rode up to the house in?

A. That is correct.

Q. That was a 1935 Plymouth, was it not?

A. That is right.

Q. And you were away about how long on that occasion?

A. Well, I wouldn't want to answer that definitely, because I don't know.

Q. Well, would you say it was a matter of minutes or hours?

A. Well, I should not imagine it would be over 40 minutes. I couldn't say definitely.

Q. You think 40 minutes would be a pretty fair estimate? Understand, I am not trying to tie you down exactly.

The Court: Just your best judgment.

A. Well, I would be a poor judge of time in a case like that. It would be between 20 and 40 minutes though.

By Mr. Clark:

Q. In what part of the house was Mr. James when you left?

A. He was on the front porch.

Q. And when you got back where was he?

[fol. 98] A. He was in the same position.

Q. When you left him on the front porch was he sitting or lying or standing?

A. He was lying down in the swing there on the front porch.

Q. When you say he was in the same position when you returned, you mean he was still lying in the swing?

A. Yes, he was still lying in the swing.

Q. And now, a note, or letter, designated People's Exhibit No. 4 has been introduced in evidence here. I hand it to you and ask you whether or not you recognize it as anything which you saw that evening.

A. I did.

Q. About what time of the evening was it, that is, was it before or after you went to the authorities that this letter first came to your attention?

A. I believe it was after.

Q. And what were the circumstances that called it to your attention?

A. Well, I couldn't state as to that.

Q. Where was it when you first saw it as near as you can remember?

A. It was on the table in the dining room.

Q. Do you remember who else was present when you first noticed it?

A. There was a deputy sheriff from Montross.

[fol. 99] Q. Hutchinson or Gillian?

A. No, neither one of them had gotten there yet. It was a deputy sheriff from Montross, from the Sheriff's office.

Q. Did any conversation occur between him and Mr. James or in Mr. James' presence in regard to it?

A. I don't believe so. I think Mr. James was in the room but I don't remember exactly.

Q. Now, when before this had you last seen Mrs. James?
A. It would be on the Wednesday night before August 5th; I don't know the date.
Q. How long, by the way, did you know Mrs. James—oh, I believe you stated that, pardon me. During the period of your acquantance, you saw Mrs. James quite often, I suppose?
A. Yes.
Q. When you last saw Mrs. James before her death, did she appear to be in her usual state of health or not?

Mr. Williams: That is objected to——
The Court: Objection sustained.

By Mr. Clark:

Q. Now, did she appear to be well——

Mr. Williams: That is objected to——
The Court: The same ruling; it is not cross examination. That is the basis for the ruling. There wasn't anything with reference to the appearance.
Mr. Clark: I think your Honor is right. I am glad to know the basis of your Honor's ruling. I had another point in mind. I do not think it is cross examination as your [fol. 100] Honor has pointed out. Thank you. I am through about that.
The Court: The Court is sufficiently sure to stick to his ruling.
Mr. Clark: Yes, your Honor. And your Honor is in charge of the law in this case.
The Court: As far as this court is concerned.

By Mr. Clark:

Q. During the time, the period of your acquaintance, you frequently saw Mr. and Mrs. James together, didn't you?
A. Yes.
Q. And they always acted in an affectionate manner towards each other?
A. They always seemed very happy and affectionate.

[fol. 101] JOHN P. TOOHEY, called as a witness on behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.
The Witness: John P. Toohey.

Direct examination.

By Mr. Williams:

Q. What is your occupation, Mr. Toohey?
A. Deputy Sheriff, Los Angeles County.
Q. For how long have you been a deputy sheriff?
A. Nine years.
Q. On the 5th of August, 1935, where were you stationed?
A. The Montrose branch of the Sheriff's office.
Q. And on that particular day were you on duty at night or in the daytime?
A. At 4:00 to midnight.
Q. Did you receive a call to go to 1329 West Verdugo Road?
A. I received a call to come to the station and accompanied Mr. Pemberton to that address.
[fol. 102] Q. Did you do so?
A. Yes, sir.
Q. What time did you arrive at the premises, 1329 West Verdugo?
A. 8:30 P. M.
Q. With whom did you go?
A. Deputy Sheriff Jones and Mr. Pemberton.
Q. When you got to 1329 West Verdugo Road, just tell us what you saw and did.
A. Mr. Pemberton took me around the back of the house to the fish pond and found the body lying on its back with the curb there at the walk there, about a two foot walk, and there is a slight walk next to the water, and her back just about resting on the curb, and her head was in the water, and her dress or pajamas were up past her knee. I noticed that the left leg was swelled and very blue, and the ants were walking all over the body.

Mr. Clark: What was that?

A. The ants were walking over the body.
Q. Was she alive or dead at that time?
A. She was dead.

[fol. 103] By Mr. Williams:

Q. Mr. Toohey, what, if anything, did you do with the body there?

A. I didn't touch the body.

Q. You didn't touch it at all?

A. No, sir.

Q. Where did you go after you observed the body?

A. I went back to the radio car and told my partner to go down and call the Homicide Detail and he did call the Homicide Detail.

Q. Did you do anything at the premises at the house there?

A. I went up to the porch and I found Mr. James sitting on the porch with Mrs. Lueck, who is now Mrs. Pemberton, [fol. 104] sitting on the arm of the swing with his arm around her shoulders. He appeared to be suffering from shock and I questioned him about when he had seen his wife last and her condition.

Mr. Williams: Now, Mr. Toohey, have you—May I have those exhibits?

Mr. Clark: Surely. (Handing to counsel.)

By Mr. Williams:

Q. I show you People's Exhibit 4 for identification, and ask you whether you saw that exhibit on that particular occasion?

A. Yes, I did.

Q. Just state when and where you saw it.

A. I went in the house with Mrs. Lueck to look for a note Mr. James said he had found, and Mrs. Lueck found this on the table and I told her to go ahead and open it. She opened it and read the contents. We asked Mr. James——

Mr. Clark: Just a moment. I will object to any statements made by Mr. James at that time upon the ground that no foundation has been laid for the reception of such evidence in that the corpus delicti has not been established and it is incompetent.

The Court: The objection is overruled. It appears to be in the best interest of the trial to conduct it in sequence, chronologically, and for that reason, the objection is overruled.

Mr. Williams: May I have the question and the answer as far as we have gone?

[fol. 105] The Court: Then, you can continue it.

(Record read by the reporter.)

A. I asked Mr. James who it was addressed to and he said it was her sister in Las Vegas, Nevada. Mrs. Lueck at that time said, "Where is the other note?" James said he didn't know where it was and he fished around as he sat up in the swing, fished around in his pockets, and after he sat up to look to see if he could find it in his hip pocket.

[fol. 106] Q. And did he produce any other note at that time?

A. Yes, sir.

Q. I show you People's Exhibit No. 3 for identification and ask you if you have seen that before?

A. Yes, sir.

Q. When and where did you see that?

A. Mr. James handed it to me after he had taken it out of his pocket.

Q. Is that the note he took from his pocket when Mrs. Lueck asked him where the exhibit was?

A. Yes.

Mr. Clark: What was the number?

Mr. Williams: 3.

The Court: 3.

By Mr. Williams:

Q. Did Mr. James say anything on the subject of who had written the note?

Mr. Clark: The same objection.

The Court: The same objection and the same ruling.

Mr. Williams: You may answer.

A. Mr. James was acting so hysterically——

The Court: Now, just a minute. Read the question again. Answer the question.

(Question read by the reporter.)

A. No, he did not.

By Mr. Williams:

Q. Now, did you observe at the fish pond whether there was any fence around the fish pond?

[fol. 107] A. Yes, sir.

Q. And did you observe anything about that fence particularly?

A. The fence near the body was lying all thrown in the water for about, I would say, eight or ten feet.

Q. And except for that eight or ten feet, what was the condition of the fence?

A. Around the curb, the outer edge of the fish pond.

Q. Will you describe the type of fence it was?

A. What I call a chicken wire fence.

Q. And about what height was it?

A. About two and a half to three feet.

Q. Now, I will direct your attention to People's Exhibit 10, which is just to my left and back of me, and ask you if ..at appears to be the type of material of which that fence was composed?

A. Similar to that, yes, sir.

Q. And did you on that night, or immediately subsequent to that time, examine around the fish pond?

A. The next day.

Q. That examination was made in the daytime, was it?

A. Yes, sir.

Q. Now, I will show you People's Exhibits 7, 8 and 9. They are in order, 7, 8 and 9, and ask you whether or not you recognize those pictures as being pictures of the fish pond, and shrubbery, and other material in the neighbor-[fol. 108] hood of the fish pond as they appeared at that time?

A. Yes, sir.

Q. Did you make an examination at that time to determine the depth of the water in the pool?

A. Yes, sir.

Q. How deep was it?

A. 14 inches at the spot where the body was found.

Q. And did you observe what the character of the bottom of the pool was?

A. It was very spongy. We prodded with a stick, and found that it would give several inches, just like a sponge.

Q. Were there any rocks, or hard substances in the bottom of the pool, at or near the point where the body was found?

A. Not anyplace where we had placed the stick.

Q. Now, in examining these pictures, Peoples Exhibits Nos. 7, 8 and 9, would you say that the shrubbery, as it ap-

pears on these exhibits, is in substantially the same condition that it was at the time that you examined this pond, on the day following the 5th of August, 1935?

A. I would not say. There was a lot of shrubbery there, but I wouldn't say that it was exactly the same.

Q. Did you observe with reference to the pond, as to whether it appeared to be secluded, or not, from the surrounding country?

Mr. Clark: Just one moment.

The Court: It calls for a conclusion. He may describe [fol. 109] the surrounding conditions, or any tests, or observations that he made, but as to whether or not it appeared to be secluded is a conclusion.

By Mr. Williams:

Q. Now, just describe as well as you can, Mr. Toohey, the height and character of the trees and shrubbery, and so forth, about the pond?

A. My recollection is that the pond was pretty well surrounded with shrubbery. Going out toward the front there were some stepping stones, as I recall it, and you had to kind of duck down to get under some of the brush where it lapped together over the walk.

Q. Was that true all around the pond?

A. I didn't pay particular attention to the back, whether you could see through the yard, or not.

Mr. Williams: You may cross examine.

Cross-examination.

By Mr. Clark:

Q. Mr. Toohey, I assure you the cross examination will be very brief, but taking these photographs, I am going to refer for a moment to Exhibit No. 7. In the upper right-hand corner here, what you see is the foliage of the tree, isn't it?

A. That is what it appears like.

Q. You were there upon the ground; you know, don't you?

A. Yes, sir.

[fol. 110] Q. And that tree was some 20 or 30 feet away from the pond, wasn't it?

A. Possibly that.

Q. Now, if one had set his camera up on the side of the picture where you see the shrubbery, so that the lens would be pointing in the opposite direction, it would have brought no shrubbery into view, would it?

Mr. Williams: Objected to as calling for a conclusion.

Mr. Clark: I will reframe it another way. Take the portion of the property on the side of the picture showing in the foreground, there was no shrubbery there at all, was there?

A. I am not sure.

Q. Now, you went back to the place, as I understand it, the next day in broad daylight, and made observations there, is that correct?

A. As to the depth of the pond, and the surface under the water.

Q. Well, did you make any observations, go anyplace to see whether an unobstructed view of the pond could be had from different points, or did you just ignore that?

A. No, sir, I didn't.

Q. I believe that concludes that branch of the interrogation. Now, when you first saw the body, did the water entirely cover the head?

A. No, sir.

[fol. 111] Q. Was the head entirely submerged?

A. No, sir.

Q. The face was not under water at all?

A. No, sir.

Q. As I understood your testimony upon direct examination—correct me if I am wrong—when you saw the body she was lying on her back with the face turned up toward the sky, is that correct?

A. Correct.

Q. And what was the position of the arms when you first saw her?

A. My recollection is that her left arm was held up near her breast, and the impression of this chicken wire was on the arm, showing that that arm had laid there for a considerable time, I would think. The right hand was hanging down alongside of her body.

Q. As I understand it, the left arm was bent, and the right arm was hanging down?

A. That is my recollection, yes, sir.

Q. By the way, did you make any written memorandum, or report then, or about that time?

A. No, sir.

Q. And the wire of the pond, did you notice whether the wire, itself, had any broken ends?

A. As I recall, it was not. On both sides it was still holding, and just about eight or ten feet of the wire was in [fol. 112] the pool.

Q. The wire was fastened to some posts, or uprights, I take it?

A. Yes, sir.

Q. And that fastening was made with staples, wasn't it?

A. I imagine so. I didn't notice.

Q. And you didn't notice any place where it had been pulled loose from the posts, did you?

A. No, sir.

Q. With reference to Mr. James, you had never seen him before that time, had you?

A. No, sir.

Q. And he appeared to you to be grief-stricken all the time that you were there, did he not?

A. That was the appearance, yes, sir.

Q. That concludes, I believe, the second line of interrogation. I have just about that many more questions. In regard to this note, Exhibit No. 3, the note written on the little piece of wrapping paper, Mr. James never denied having the note, did he?

A. No, sir.

Q. And he searched in his pockets, fumbled in his pockets for it, didn't he?

A. Yes, sir.

Q. He appeared to be very nervous at that time, didn't he?

A. He did.

[fol. 113] Q. But he, himself, found the note in his pocket, didn't he?

A. He took papers out, and I looked through them with him.

Q. So that as he produced the papers, you and he looked at them, and you found the note amongst them?

A Yes, sir.

Q. Now, the note that Mrs. Pemberton mentioned is this same note that we have been talking about, People's Exhibit No. 3?

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Mr. Clark: As I get the facts, Mr. Toohey, Mrs. Pemberton made some mention of a note that had been found by Mr. James that evening, is that correct?

A. Yes, sir.

Q. She referred to it as being Ethel's note, didn't she?

A. She didn't refer to any one particular note.

Q. Just what did she say in regard to it, as near as you [fol. 114] can remember?

A. She said that Mr. James had found a note.

Q. And then you asked him where it was?

A. I asked him where it was.

Q. And she said Mr. James had it?

A. She thought he had it.

Q. And then after what we have already been discussing Mr. James produced the note which I now hand you, and which is marked People's Exhibit No. 3 here, is that correct?

A. That is it.

Mr. Clark: I think that is all.

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[fols. 115-118] A. L. Hutchison, called as a witness in behalf of the People, being first duly sworn, testified as follows:

Direct examination.

By Mr. Williams:

Q. Mr. Hutchison, what is your occupation?

A. Deputy Sheriff of Los Angeles County.

Q. Attached to what detail?

A. The Bureau of Investigation.

Q. And how long have you been a Deputy Sheriff attached thereto.

A. I have been there since December 1st, 1926.

Q. Were you on duty on the evening of August 5th, 1935?

A. I was.

Q. In the Bureau of Investigation?

A. I was.

Q. And did you on that night answer a call to the premises at 1329 Verdugo Boulevard, in La Canada?

A. I did.

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[fol. 119] Q. And how far from the immediate edge of the pond was the body resting?

A. Well, the body was resting right on the pond, and she was laying upon her back, and I should say the shoulders were lying upon the cement on the edge of the pond, and the head was hanging back kind of, and the hair was hanging down, and she was touching the water.

Q. Was there some chicken wire there?

A. Yes, there was some chicken wire, and the body was laying upon it.

Q. Did you observe the body at that time, to observe whether there was any cuts, or marks upon it?

A. I made a preliminary examination of her, yes.

Q. You had a flashlight, did you?

A. Yes.

Q. You had driven out there, but you had the aid of a flashlight?

A. Yes.

Q. And did you observe whether or not there was a cut on her foot?

A. Well, I noticed a cut on her left toe, her big toe on [fol. 120] the left foot.

Q. You noticed a cut on the big toe of the left foot?

A. Yes, sir.

Q. Are you certain about that?

A. Yes, I think that is where it was.

Q. Yes. Did you observe where this cut was, with reference to the toe, the top or the bottom?

A. No, I don't remember that.

Q. And did you observe anything else, any cuts or bruises about her body?

A. Yes, her left leg—the flesh was very dark, you might say, and it was almost black between the ankle and the knee, very black.

Q. A black and blue mark between the ankle and the knee?

A. Yes, very much so.

* * * * * * *

Q. Now, did you observe whether or not she was attired in a dress, or pajamas?

[fols. 121-134] A. Yes, she—at that time I couldn't tell whether it was pajamas, or a house dress, but it was pulled up above her knees, and she had a pair of house slippers

on, old house slippers. She just had a strap across the toe, more of a sandal.

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[fol. 135] CHARLES H. HOPE, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.
The Witness: Charles H. Hope.

Direct examination.

By Mr. Williams:

Q. Mr. Hope, you are, at the present time, confined in the County Jail of Los Angeles County, are you?
A. Yes, sir.
Q. And you have been indicted for the murder of Mary Emma James?
A. Yes, sir.
Q. To which indictment you did, a few days ago, plead guilty in this court?
A. Yes, sir.
Q. You are now waiting for your sentence to be fixed by the Court?
A. Yes, sir.
Q. Do you know the defendant, Robert James?
A. I do.
Q. How long have you known him?
A. For a period of about seven years.
[fol. 136] Q. And when and where did you first meet him?
A. At the Trinity Barber Shop on Grand Avenue. I was a customer of the barber shop.
Q. Had you seen him from time to time, from that time up until the 5th of August and thereafter, of 1935?
A. Yes, sir.
Q. And during the month of June, 1935, did you meet the defendant, James?
A. I did.
Q. Where did you meet him?
A. At the barber shop.
Q. Where was the barber shop?
A. It was on 8th Street between Grand Avenue and Olive Street.

Q. In the City of Los Angeles?
A. Yes, sir.
Q. And did you at that time have a conversation with Mr. James?
A. I did.
Q. What did he say to you and what did you say to him?

Mr. Clark: Just one moment. That is objected to on the ground that no proper foundation has been laid and it is an attempt to prove the oral statement or declarations of the defendant before the corpus deliciti has been proved, and for the purpose of establishing the corpus delicti, and such evidence is incompetent.
[fol. 137] The Court: The objection will be overruled. He may answer.
Mr. Williams: Will you read the question, Mr. Obrien, please?

(Question read by the reporter.)

Mr. Clark: I wish to make the further objection because I think I know what the witness's testimony will be, that the testimony, the conversation, is irrelevant to all of the issues of this cause.
The Court: The objection will be overruled.

A. He asked me if I know anything about rattlesnakes. I told him "No." He asked me if I could find out. I told him I would try to.

Mr. Clark: I now move to strike the testimony of this conversation out upon the ground that the evidence is incompetent, irrelevant and immaterial.
The Court: Motion denied.
Mr. Williams: Was there anything further said?

A. Yes, sir.
Q. Just relate the entire conversation.

Mr. Clark: The same objection, your Honor.
The Court: Overruled. You may answer.

A. He went outside of his barber shop and said he had a friend who had a wife, that had been annoying him quite a bit, and he was going to kill her and wanted to get some rattlesnakes, and laughed about it. I believed he

meant it was none of my business what he wanted them [fol 138] for. He said, "If you will get me some rattlesnakes, I will give you $100.00".

Mr. Clark: I now move to strike the testimony out on the ground it is incompetent, irrelevant and immaterial.

The Court: Motion denied.

By Mr. Williams:

Q. All right. Go ahead and tell the rest of the conversation.

Mr. Clark: It will be understood, of course, that I am standing upon the objection originally made as to the conversation?

The Court: It will be understood that the original objection to the effect that the testimony is irrelevant and that it is incompetent because the corpus delicti has not yet be-- proven, be interposed to each question with reference to this conversation and as to each of those objections let the record show that the Court overrules the objection and if motion to strike were made to the matters upon the grounds set forth in the objection, that the motion would be denied. Go ahead.

[fol. 139] A. He stated if I had to go to the desert to get them, he would defray all expenses.

Q. All right. Then did you see him again later?

A. Yes, sir, along towards the last of June, I don't remember the exact date.

Q. Where did you see him?

A. In his barber shop.

Q. And did you then have a conversation with him?

A. He asked me if I found out about rattlesnakes.

Mr. Clark: Just a moment. I move to strike that answer out for the purpose of an objection.

The Court: For the purpose of making the same objection?

Mr. Clark: Yes, your Honor.

The Court: The motion will be denied. Make the objection, however, so that you may preserve your record. It will be presumed that the objection preceded the ruling, and the answer. Objection overruled.

Mr. Williams: May we have the——

The Court: And as to the several questions asked as to the conversation which the witness has fixed as being some time in the last of June, the record may show that Mr. Clark is given the benefit of the objection upon the same ground, and the objection will be the same as to the prior conversation, and the objection is overruled.

Mr. Williams: Will you read the answer as far as it went, Mr. Obrien?

[fol. 140] (Answer read by the reporter.)

Mr. Williams: Just tell the rest of the conversation.

Mr. Clark: To which we object on the grounds heretofore stated, on the same grounds, that the corpus delicti has not been established, and that the evidence is incompetent.

The Court: You have already covered it, but I will rule on it again. The objection is overruled. You can have the benefit of that same objection to any separate question relating to this same conversation, and the Court will make the same ruling.

Mr. Clark: Yes, your Honor.

Mr. Williams: Proceed.

A. I told him I thought I could purchase some rattlesnakes for him.

Q. Was that the extent of the conversation?

A. Yes, sir.

Q. Did you thereafter purchase some rattlesnakes?

A. Yes, sir.

Q. Where did you purchase the rattlesnakes?

Mr. Clark: Just one moment. That is objected to on the ground that it is immaterial and irrelevant.

The Court: It will be overruled.

A. I purchased them in Long Beach, from a gentleman by the name of Mr. Kirby.

Mr. Williams: How many rattlesnakes——

Mr. Clark: Just one moment, Mr. Williams, if you will [fol. 141] oblige me. If your Honor please, we will interpose the objection last stated to every question asked for the purpose of illustrating any statement by this witness with relation to anything he did with regard to the purchasing of rattlesnakes, or any use that he made of them. I make this statement in the interest of economy of time.

I assume that your Honor, upon the ground of irrelevancy, would overrule the objections if they were made, and that there would be no use in me making them to the general line of testimony concerning what this witness did about the rattlesnakes, unless there was some other factor entered into the objection, in which case I will state any additional grounds I may have.

The Court: In the present status the Court holds the objection that it is irrelevant should be overruled, and it is overruled, as within the scope of the issues raised by the pleading and the plea, and within the indication of the District Attorney's opening statement it appears to be relevant.

Mr. Clark: My thought is at this time that there is frequent occasion when it can only be ascertained after evidence has been heard whether it is irrelevant or not, and I am trying to exercise some precaution in so preserving my record, so that at the proper time appropriate motions can be made, if the evidence seems not to be relevant or competent.

The Court: You may proceed.

Mr. Williams: May we have the part of the——

[fol. 142] Mr. Clark: May I then add to the objection the latter objection, that the evidence is incompetent, as well as irrelevant?

The Court: I ruled on the same thing, but I may say that a general objection, incompetent, does not mean very much. You may proceed.

Mr. Williams: May I have the last question and answer read, your Honor? I realize that I should have kept them in mind, but I didn't.

(Record read by the reporter.)

Mr. Clark: Now, if your Honor please, in addition to the grounds heretofore stated, I object to the question upon the further ground that the testimony is incompetent, in that it is an attempt to prove the commission of one offense by proving facts which constitute an entirely different offense.

The Court: The objection will be overruled.

By Mr. Williams:

Q. How many rattlesnakes did you buy from Mr. Kirby?
A. Three.

Q. After buying the rattlesnakes, what did you do with them?

A. I took them to my apartment, and kept them for a couple of days, and delivered them to Mr. James at his home.

Q. And where did you deliver them? At what home?

A. At Mr. James' home in La Canada.

Q. What time of the day or night was it that you delivered [fol. 143] them?

A. I don't remember exactly; I believe it was in the evening.

Q. Was Mr. James there when you delivered them?

A. Yes, sir.

Q. Did you have any conversation with Mr. James, with reference to the snakes that you were delivering, at the time of the delivery?

A. I don't believe so.

The Court: Was anything said at all?

A. No, sir, not that I remember.

The Court: You don't mean that you remained mute and dumb?

A. Well, no, sir.

Mr. Clark: It will be understood, of course, that as to any conversation——

The Court: The same objection may be considered as having been interposed as was interposed to the former conversation between the defendant and this witness upon the same subject matter, and the same ruling.

By Mr. Williams:

Q. Did you pay money for the rattlesnakes that you purchased from Mr. Kirby?

A. Yes, sir.

Q. How much did you pay?

A. $5.00.

Q. Now, when you delivered the snakes to Mr. James, [fol. 144] did you have any conversation with him?

A. No, sir, I told him——

Mr. Clark: Just a moment. I object to the conversation upon the same grounds that I have been objecting to all of the others.

The Court: Same ruling.

Mr. Williams: Proceed, Mr. Hope.

A. I told him there was the snakes. He said, "All right." He wanted to know where I got them. I told him it didn't make any difference, and went on back to Los Angeles.

Q. Now, either before or after you delivered those snakes to him, did he pay you any money?

A. He paid it to me about the second day I had them.

Q. Was that before or after you delivered them?

A. That was before I delivered them.

Q. How much money did he give you?

A. I think it was $20.00.

Q. Did you have any conversation with him at that time?

A. I beg pardon?

Q. Did you have any conversation with him at that time?

A. When he gave me the money?

Q. Yes.

A. I told him I had the snakes, and I had been to considerable expense to get them, running around over the country, taking up my time, and he hadn't at this time paid me the $100.00 that he agreed to, and he gave me $20.00 for [fol. 145] these snakes.

Q. Now, subsequent to delivering the snakes to Mr. James, did you see him again, that is, after you delivered the snakes to Mr. James did you see him again?

A. Yes, I saw him in his shop, and he asked me—I was getting ready to move from downtown out on Santa Monica Boulevard. He wanted to know if I was doing anything. I wasn't at that time. He said, "Well," I could come out and stay at his house for four or five days. He had a little work around there for me to do, which I never did very much, and I went out to his house and stayed there. I think I was there one day by myself, and the remainder of the time I came to town with either Mr. James, or Mr. James and his sister.

Q. Now, can you fix about the date when you went to his house to live?

A. Only in this manner, that I went to live at his house on a Friday, preceding the Monday when Mrs. James went to Long Beach to a convention.

Q. How long did you stay at Mr. James' house?

A. I stayed there until the following—I think it was the following Wednesday.

Q. And during that time did you have any conversation with him?

A. Yes, sir.

Q. Just state what the conversation was.

[fol. 146] Mr. Clark: To which I object on the ground that no foundation has been laid therefor, and that the evidence is incompetent, being the same objection heretofore interposed to the other conversations sought to be elicited.

The Court: The objection will be overruled.

A. He ordered me to go into town with him to go over to a cabinet maker and have two boxes made, the dimensions of which I don't know. There is a bill of sale there for them.

Mr. Parsons: Sometimes the witness drops his voice, and I can't hear him.

The Court: I didn't get the last part of that answer, either. Will you read it, please, Mr. Reporter?

(Answer read by the reporter.)

By Mr. Williams:

Q. Did he say anything with reference to what the boxes were to be used for?

Mr. Clark: That is objected to on the additional ground it is leading and suggestive.

The Court: Overruled.

A. He said to tell the cabinet maker, if he asked any questions about them, that we were going to keep white mice in them. At that time there were two white mice at his house, that I got with the first batch of snakes.

By Mr. Williams:

Q. Did you have the boxes made?

A. Yes, sir.

Q. Where did you have them made?

A. On Western Avenue, about a block or two blocks south [fol. 147] of Melrose.

Q. Do you remember the name of the man who made them for you?

A. No, sir, I don't.

Q. All right, did you pay for the boxes?
A. Yes, sir.
Q. How much did you pay for them?
A. I think they were $5.00.
Q. Describe the boxes as they appeared after they were completed?
A. Well, they were about this long.
Q. Indicating about two feet long?
A. About two feet long, about nine inches high, and they had a glass top.
Q. Did the top open?
A. Very easily, yes.
Q. Now?
A. It had a sliding top. It was in a groove.
Q. After you got the boxes, what did you do with them?
A. I put them in the car, and I drove back down to Mr. Kirby's. I had the rest of the day to call, and he returned home with me.
Q. After you saw Mr. Kirby, you say he returned home?
A. After I had been to Mr. Kirby's house, yes.
Q. Well, what did you do with the box after that?
A. I left them. I gave them.

[fol. 148] Mr. Clark: I couldn't hear the witness.
The Court: You drop your voice.

A. I had them in the car, and I went and delivered them out to Mr. James' house.

By Mr. Williams:

Q. After you got to the house, what, if anything, did you do with them?
A. I didn't see it, myself. I put the two snakes in the box for delivery to this man.
Q. Did you have any conversation with Mr. James at that time?
A. Yes, I imagine he——
Mr. Clark: Just a moment——

By Mr. Williams:

Q. Now, was anything said on the question of paying for the boxes?

Mr. Clark: Just a moment: that is objected to on the ground that it is leading and suggestive, and it is also

objected to on the ground made to the other conversation, on the ground that no proper foundation has been made, and the statements of the defendant are incompetent, and that the evidence is incompetent.

The Court: The objection is overruled. The Court recognizes the fact that you cannot recognize any part of the corpus delicti. That means——

Mr. Clark: I understand, your Honor. There is one other law that I would like to call to your Honor's attention after the jury leaves, for a brief moment.

[fol. 149] The Court: All right.

A. Shall I go ahead?

By Mr. Williams:

Q. All right.

A. He gave me the money for the box in the morning.

Q. How much money?

A. $5.00.

Q. At that time did you have any conversation with him?

A. He told me he wanted the boxes, to have a hole out in the side of it. I said, "How big a hole?", and he said, "Put your two fists like that, and draw a circle around it, and cut it out that way."

Q. Now, after you had delivered the boxes to Mr. James, did you have a further conversation with him?

A. Not until I had left there, which was some time later in the middle of—I guess it was about the middle of July.

Q. And where did you have this conversation?

A. In his barber shop.

Q. What did he say to you, and what did you say to him?

Mr. Clark: That is objected to as no proper foundation laid, and the corpus delicti has not been proven.

The Court: The objection is overruled.

A. And he said the man was dissatisfied with the snakes that I had, and that they were not fighters, and that he and his family had been down to Ocean Park and had noticed the snake pit down there, and that they had good snakes there, and in the conversation with gentlemen that were running [fol. 150] the pit, they said that they sold snakes by the pound.

Mr. Silverman: That was a conversation with Mr. James.

The Court: I believe it is.

Mr. Silverman: Otherwise it would be hearsay.

[fol. 151] By Mr. Williams:

Q. Proceed with the conversation you had with Mr. James.

A. When we went to Ocean Park we submitted them and sold them for 70 cents a pound. He asked me if I was busy that afternoon and I told him I was not. So I went down to Ocean Park with him.

Q. When you got down to Ocean Park, where did you go?

A. We went to the snake pit and waited for about an hour. I was asking him questions—I didn't hear a whole lot of it, but I did hear from the man that owned the pit say, "I will bet you $20.00 there isn't a poisonous snake in the pit." I went around on the other side and he told me to and I didn't want anybody to think we were together.

Mr. Silverman: We are unable to hear what the witness is saying. I have tried to be attentive, your Honor. May I have that last answer read up to that point?

(Answer read by the reporter.)

Mr. Clark: It would be hearsay to go any further.

Mr. Silverman: That is hearsay, and I object to it as incompetent.

A. I heard Mr. James say to the man that owned the pit and he walked over to my seat and he pointed out one snake and said, "That is the one I want", and he left. The following day he sent me down to buy it.

By Mr. Williams:

Q. Well, you say he sent you down to buy it. When he sent you down, did you have a conversation with him?

[fol. 152] A. That was at the snake pit. He said, "I think the man will be satisfied." Now, in this box there was the one live snake and he brought his car down the next day and in this car was one of the sliding top boxes, with one snake in it. He gave me his car and I went to Long Beach. I got this snake—I gave this snake to the man in the pit.

Q. Was this Mr. Kirby of Long Beach?

A. No sir, this was the man at Ocean Park. It was one of the snakes that I got from Mr. Kirby.

Q. Wait a minute. You said you went to Long Beach with this snake. Did you mean Long Beach, or Ocean Park.

A. To Ocean Park, where we went the day before.

Q. And you gave the snake which you had purchased at Long Beach to the man at Ocean Park?

A. Yes, sir. He wasn't there at that time. The next door they had a concession there. They had a doctor there. I waited for this man to show up and he didn't show up there. I said, "We are very hot", and I said, "Wait there while I dump this snake——"

Mr. Parsons: We object to that and ask that it be stricken.

The Court: That may be stricken.

Mr. Parsons: I think that is all hearsay.

The Court: What his conduct was I do not think is hearsay.

Mr. Parsons: What he said?

The Court: The only thing he stated was what he said to the doctor. That is stricken. That is the only conversation that was stated.

[fol. 153] By Mr. Williams:

Q. What did you do?

A. I waited around there and finally the man that owns it came back and pointed out what I thought was the same snake and he put it in a box and I took it down and delivered it to Mr. James' barber shop.

Q. What snake do you mean?

A. The one Mr. James had pointed out the day before.

Q. The one that Mr. James had pointed out the day before?

A. Yes.

Q. And when you delivered that snake to James, did you have any conversation with him?

A. Yes, he paid me for the snake. He went on home and I went my way.

Q. Did you see him thereafter?

A. I used to go in his shop after work. I was working nights and I was working days part of the time and nights part of the time. When I was working I would stop in to get a hair cut at the barber shop.

Q. Did you see him after August 3, 1935?

A. I did.

Q. Where?

A. At his barber shop.
Q. Did you have a conversation with him?
A. I did.
Q. What was the conversation?

Mr. Clark: We object to this conversation on the ground [fol. 154] that the corpus delicti has not been established and it is an attempt to establish the corpus delicti——
The Court: The objection is overruled; you may proceed.

A. He said the snake was no good. He wanted some fighters. But I heard that the gentleman at Ocean Park had snakes that they bought from a fellow named Snake Joe at Pasadena. He said, "Go over and get some if you want real fighters." He said they fought chickens and dogs. However, inquiring around all over the country, I finally got these snakes.
Q. And did you get some snakes there?
A. Yes, sir.
Q. How many?
A. Two.
Q. After you got them, what did you do with them?
A. They were in two boxes, one in a glass box and one in a small box that had like a screen door on top and I put them all in the car and brought them back to Los Angeles and telephoned Mr. James that I had the snakes. He met me out front of the shop.
Q. Did he see you there?
A. He did.
Q. When he met you what did you do?
A. He told me to drive around the block and he would be ready to go. I drove around the block and as I came back, he came out of the shop and got in the car and drove out Vermont Avenue to Slauson.
[fol. 155] Q. Now just a moment; let us go back to your trip out to Snake Joe's.
A. Yes, sir.
Q. Did anybody go with you?
A. Yes, my wife.
Q. And what car did you drive?
A. Mr. James' car.
Q. What kind of a car was that?
A. A Plymouth sedan. I had driven that car on all trips except the first.

Q. Now, when you met Mr. James in front of his barber shop, you were in the Plymouth sedan?

A. Yes, sir.

Q. Where was your wife?

A. At home.

Q. And did Mr. James get in the car?

A. Yes.

Q. Who drove the car?

A. Mr. James. He asked me where I was going and I told him I was going out home. My car was at Beverly and Vermont, and we stopped at a drug store and he handed me $5.00 for a prescription, and told me to go into the drug store and have the prescription filled and to buy two inches of adhesive tape. I asked the druggist what the prescription was for, but he wouldn't tell me what it was. I took the adhesive tape and the prescription and gave it to Mr. James.

[fol. 156] Q. And then what happened?

A. I started to get out of the car——

Mr. Clark: Just one moment; I object to what he told, upon the grounds that have heretofore been stated.

The Court: The same objection will be noted and the objection overruled.

A. May I have a drink of water?

The Court: Yes.

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[fol. 157] Q. Mr. Hope, when court adjourned last night you had just stated that on the 3rd of August, 1935, you had delivered some snakes to Mr. James and Mr. James had taken you in his car, that you had stopped and bought some adhesive tape and had a prescription filled and then you had proceeded in the car with Mr. James to a point about Beverly and Western, I believe.

The Court: Beverly and Vermont.

Mr. Williams: Beverly and Vermont.

Q. Did you at that time and place have a conversation with Mr. James?

A. Between the drug store and the place where he let me out, yes sir.

Q. What was the conversation?

[fol. 158] Mr. Clark: The same objection is being reserved, your Honor as to these other matters upon the assumption it will not be necessary for me to object.

The Court: The same ruling.

Mr. Williams: You may answer.

A. There was no third party. He told me his wife had $5,000.00 worth of insurance and he was going to collect it.

Q. Well, tell us the conversation.

A. That was all of it that I remember right at the time.

Q. Did he say anything about your connections with it——

Mr. Clark: That is objected to as leading and suggestive, your Honor.

The Court: Overruled.

A. Not that particular time, I don't believe.

By Mr. Williams:

Q. Well, after that conversation, what did you do?

A. I went out in my car over to my wife's apartment and got her *and got her* and had dinner and went to a show.

Q. All right; when did you next see Mr. James?

A. I went after my wife by 10 o'clock in the morning.

Mr. Parsons: What was the answer?

(Answer read by the reporter.)

By Mr. Williams:

Q. Well, did you get your wife?

A. Yes, sir.

Q. And did you go any place with your wife?

A. I drove to La Canada and asked her to wait on the [fol. 159] corner, so I had a chance to go up in Mr. James' house and get the snakes back.

Mr. Parsons: May we ask that that be stricken out?

The Court: Yes, that last remark may be stricken out.

By Mr. Williams:

Q. Well, you left your car at the James residence?

A. I did.

Q. Did you go to the James residence?

A. I did.

Q. About what time did you arrive at the James residence?

A. Oh, I would say it was in the neighborhood of 12:30 or quarter of 1:00.

Q. Did you meet any parties there?

A. I walked up and Mr. James came out.

Q. Did you have a conversation?

A. I did.

Q. Tell us what conversation you had.

A. He came out and he had been drinking a little bit and I told him that I——

Q. Speak louder; we cannot hear you.

Mr. Clark: No, we cannot hear you. May we have the reporter read that, your Honor?

The Court: Yes.

(Record read by the reporter.)

A. He said I would not have them right then.

By Mr. Williams:

Q. Do you mean that James said you couldn't have them [fol. 160] right then?

A. Yes, sir.

Q. All right, give the rest of the conversation.

A. I talked to him for a little while, had a couple or three drinks with him in the garage. The snakes were in boxes in the garage, alongside of the boxes were three or four dead chickens. I went back after talking to him and told my wife not to wait for me, that I couldn't get the snakes then, that I would——

Mr. Parsons: Move to strike out what he told his wife.

The Court: Motion granted. Stricken out. The jury is admonished to disregard the same.

Mr. Williams: Did you then go back to where James was?

A. I went back to Mr. James' residence, yes sir.

Q. Where were you and James standing or sitting at that time?

A. We were in the garage.

Q. What conversation did you have after you got back?

A. I was in the garage approximately 10 minutes when he came out and said, "You are in this thing just as deep as I am. You have bought these snakes all over the country.

I have had you out here at the house. Different people have seen you." He said, "Now, bring that box in the house." He went behind me and I walked ahead of him with the box.

Q. What box?

A. The box with the snake in it.

[fol. 161] Q. Was that one of the glass top boxes?

A. That was one of the glass top boxes, yes sir.

Q. And did you go into the house?

A. I went into the house. He went by me and raised this lady's foot up——

Q. Wait a minute, you are getting ahead of your story. When you went into the house, did you go in through the back door?

A. Yes, sir.

Q. Did you go into the kitchen?

A. Yes, sir.

Mr. Clark: Just a moment, that is leading and suggestive. I submit that as to these details it would be better that the witness should testify himself.

The Court: I don't think the question is leading, because it does not indicate what answer is expected. It is in the interest of getting the matter in sequence. However, I am going to ask you to avoid that manner of question as far as possible.

[fol. 162] Mr. Parsons: I don't desire to criticize counsel, and I don't believe counsel did it deliberately, but he stated to the witness, "You are getting ahead of your story", which would indicate there was some understanding about the story.

The Court: I don't think there is any such inference warranted by the question. It is evident that before any person can relate what happened inside a house, he must get into the house.

Mr. Parsons: I don't think any such inference should be made, however.

The Court: Perhaps it should have been omitted. However, the jury will disregard any inference.

Mr. Clark: I take it that it will be understood that I am objecting to the relevancy of the testimony?

The Court: Yes. Apparently the testimony is relevant.

A. He held the screen door open, and I went through the back door into the kitchen. He passed me, and Mrs. James was lying on the breakfast table with a piece of adhesive

tape over her eyes, and over her mouth. He went ahead of me, raised her foot up so I could get by, and pointed to where I was to set the box, on the seat of the breakfast table, which I did. In setting that down, the top flew back. He put her foot in the box. After he closed the box I took the box back to the garage.

By Mr. Williams:

Q. Was the snake in the box when the foot was put in it?
[fol. 163] A. Yes.
Q. Was it alive?

Mr. Clark: Your Honor, I submit that is leading.
The Court: Overruled.

A. The snake was in the box, and was alive.

By Mr. Williams:

Q. Did you notice any movement on the part of Mrs. James?
A. As I went in I noticed Mrs. James move on the table, yes.
Q. How was she clothed?
A. At that time she was in a nightgown. Her legs were bare. That is all that she had on, was a nightgown.
Q. Which leg was it that was put into the box by Mr. James?
A. The left one.
Q. Now, after that what did you do?
A. I stayed in the garage for approximately 15 or 20 minutes, and he came out and brought me a water glass full of whiskey.
Q. Do you mean James came out?
A. Yes, sir.
Q. Did you have some drinks with him at that time?
A. I did.
Q. State the conversation.
A. He said, "What is the matter with you? What are you so nervous about? She is all right. Drink this; it will [fol. 164] steady your nerves." I said, "I want the key to your car. I want to take the snake away, and get away." He said, "I will bring it out to you in a little bit." He went back in the house, and in a little bit he did bring the key to

the car. I put the dead chickens, the box with the snakes, and a gunny sack in the car.

Q. Where did you go?

A. To Los Angeles.

Q. Whom did you meet?

A. I met my wife. I went to the apartment. She was not there. She was visiting some friend approximately three or four blocks away from her apartment house. I drove over there, and as I drove up she and her friends came out and got in the car, and I followed her around to her apartment. At that time, when she started to get into Mr. James' car——

Q. Don't tell any conversation. Did she get into Mr. James' car?

A. She did.

Q. And then where did you three go?

Mr. Clark: That is objected to on the additional ground that this evidence is incompetent, irrelevant and immaterial.

The Court: Overruled.

A. We drove over toward Pasadena, stopped on the way, and she had her dinner, drank some beer. We went on over to this place where I had purchased the snakes, and returned the two snakes to this man.

[fol. 165] By Mr. Williams:

Q. That is Snake Joe?

A. Yes.

Q. After that where did you go?

A. We got in the car. I don't know just where we did go at first, but we started towards Los Angeles. We all were going to drive to the beach. We always go to the beach on Sunday, and it was growing a little late at that time, and we did start to the beach. Along on Venice Boulevard I threw one of the boxes out. It was getting dark. She said we would not have time to go to the beach; that we were invited out that evening; that we might as well go over there now. I said "All right"——

Q. Never mind what you said. You did throw one of the snakes out. At what place?

A. On La Canada, within a mile or two of Venice Boulevard.

Mr. Parsons: What was that answer, please?

A. On La Canada, near Venice Boulevard.

By Mr. Williams:

Q. You don't mean La Canada, do you?

Mr. Clark: La Cienega?

A. No, I mean La Cienega.

By Mr. Williams:

Q. And that left you how many boxes in the car?

A. One box.

Q. Did you do anything with the second box?

A. Threw it out along the roadway on Venice Boulevard.

Q. Now, did you go back to the James house after that?

[fol. 166] A. I returned there about 1:30 at night. We went to call on these people.

Q. Did you go by yourself to the James house?

A. I went by myself to the James home.

Q. By what means did you go?

A. In Mr. James' car. I went to return his car to him.

Q. When you got to the James house what did you do with the car?

A. Put it in the garage.

Q. And did you then see anybody?

A. Mr. James came out. He had been drinking and wanted to know where I had been and what I had done with the snake.

Mr. Clark: Just a moment. I think any conversation that occurred at that time would be subject to the same objection and upon additional grounds, that is, I mean for additional reasons.

The Court: You may state the other grounds of your objection.

Mr. Clark: Assuming the existence of any conspiracy, it would appear from the testimony that the witness has given, that the conspiracy, so far as he was concerned, is at an end, and therefore, his conduct and actions thereafter are not relevant and are wholly immaterial.

The Court: That objection supplementing the objection previously made to conversations with the defendant will be overruled.

[fol. 167] Mr. Williams: Just state the conversation that you had with James when you got back there about 1:00 o'clock.

A. Continuing where I left off?

Q. Yes.

A. Well, I got him in the car and he sat down in the car with me and put the bottle down in the seat and had a couple of drinks with me and kind of cooled down a little bit and he said, "Those snakes are no good either. My wife is not even sick." I said, "Why didn't you take her to the hospital?" and he said, "No, they will strike us both higher than a kite."

He jumped up and said, "I am going in and drown her."

Mr. Clark: Now, we object on the ground that it is an attempt to prove the corpus delicti by the statements of the defendant——

The Court: Motion denied; and the objection overruled.

By Mr. Williams:

Q. What happened after he said that?

A. James went in the house and I stayed in the car. About 4:00 o'clock he came out and said, "That is that."

Mr. Clark: Just a moment. I object to any further statement of the defendant as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. He said, "Stay here a little bit, and I will take you into town." I don't know what time it was, but it must have been 6:30 or 7:00 o'clock and he came back out and says, [fol. 168] "She has been dead since 4:00 o'clock. The house is all cleaned up and you will have to go in and help me carry it out."

By Mr. Williams:

Q. Did you go in?

A. Yes, I went in through the back door.

Q. Did you see anybody in the house?

A. After I got into the kitchen, yes.

Q. Whom did you see?

A. I saw Mrs. James laying on the floor in the hallway, her head towards the front of the house.

Q. You say her head was towards the front of the house?
A. Yes.
Q. Towards the bathroom?
A. No, her feet were towards the bathroom.
Q. And her head was toward the front of the house?
A. Yes, sir.
Q. And was she living or dead at that time?
A. She was dead.

Mr. Clark: Just one moment—Oh, I don't think I will object to it.
The Court: I didn't get the answer.

(Answer read by the reporter.)

A. She was dead.

By Mr. Williams:

Q. What happened after you got to where her body was in the house?

A. James took the upper part of the body and I took the [fol. 169] lower and he went through the door that led out to the back, down to the sidewalk towards the fish pond. He said, "You will have to put her in the fish pond." And I said, "I won't do it." And I went back to the car and I was in the car approximately three or four minutes when he came back to the car and handed me a bucket of soiled clothes. In this bucket I saw a couple of pieces of rope and a red sweater and some tape. Also there were three blankets in the back end. We started to Los Angeles, and on our way he says, "Don't get all excited, don't be so nervous. I will take care of you when I get this money."

We drove to Virgil and Byrne and he got out and he handed me $30.00 and he said, "You will have to dispose of this stuff and get out of town."

Q. What did he do then?

A. I took the blankets and bucket and put them in the back end of my car. I went around with my car and I went to get my wife and she was having breakfast.

Q. You saw her then at that time?

A. Yes, sir.

Q. Now, thereafter, did you do anything with that bucket and its contents?

A. Not right at that time, no sir. I took her to work and came back and took the stuff out of the back of the car

and packed it in the sack that had dead chickens in it, and put it back in the car.

[fol. 170] Q. Then what did you do?

A. I went for a drive. I don't know where I was going.

Mr. Clark: What was the answer?

A. I went for a drive.

By Mr. Williams:

Q. What did you do with the blankets?

A. I left them in the house. There was a bunch of laundry that was going to the laundry, and I left it on the floor.

Mr. Clark: I am sorry, but we cannot hear over here at all.

The Court: Just keep your voice up.

A. We left the blankets on the floor, where there was some other dirty linen that was going to the laundry, and I left it on the floor.

Q. Now, Mr. Hope, did you thereafter do anything with the material that had been in the bucket?

A. Yes, I disposed of it in the incinerator.

Q. What did you dispose of? Tell us everything that you put into the incinerator?

A. I don't know what was in there.

Q. Well, just as you can remember.

A. A red sweater, a couple of Turkish towels and I do not know what else was in the bottom of the bucket. There was some other things, but I do not know what they were.

Q. And now, about those chickens, what did you do with those?

A. They were in the sack. Those that were in the sack [fol. 171] were left in the sack and thrown in the incinerator with the others.

Q. Where did you burn this stuff?

A. At the incinerator back of the drug store.

Q. At what location?

A. Out in the location of—on South Vermont.

Q. Did you do anything with the blankets other than leave them there in the house?

A. Yes sir, there was one blanket that was damp and wet and the other was dry. I called my wife at 12:30 or quarter of 1:00 and took her to lunch and procured this laundry to

take to the laundry, and there were two of the blankets taken to the laundry that were laundered. That laundry is located on Santa Monica Boulevard about a block and a half from Virgil Avenue.

Q. And did you see that laundry?

A. Yes, sir.

Q. Do you know where that is now?

A. Yes sir, District Attorney's office has them.

The Court: I didn't get that.

A. The District Attorney's office has them.

By Mr. Williams:

Q. Everything you have testified to occurred in Los Angeles County, California, did it?

A. Yes.

Q. I show you now some rope and ask you if you recognize that as being any rope that you saw at any time in con- [fol. 172] nection with this transaction that you have told us about?

A. That looks exactly like the rope, the piece that was in the bucket there.

Q. And when you saw Mrs. James in the kitchen, will you describe the type of rope or kind of rope that she was tied with at that time?

A. Like this, like cotton clothes line.

The Court: Just to clear the record. As I understand your testimony was that the rope in the bucket was burned?

A. In pieces.

Q. And that appears to be the same kind of rope?

A. Yes, sir.

Mr. Williams: I ask that this be marked——

The Court: 11 for identification.

Mr. Williams: Yes, that will be number 12, won't it?

The Court: It will be 11 for identification.

By Mr. Williams:

Q. Did you observe the manner in which Mrs. James was dressed at the time that her foot was forced into the box?

A. Yes.

Mr. Clark: I object to that as incompetent, irrelevant and immaterial.

Mr. Williams: If it has not been answered, I don't insist.

Mr. Clark: It has. He stated she had nothing on but the nightgown.

Mr. Williams: That is all right if he did.

[fol. 173] Q. Did you observe the manner in which she was dressed at the time you observed her, how she was dressed?

A. In pajamas and house shoes.

Q. Did you observe whether she was dry or wet?

A. The clothing was all dry but her hair was a little damp.

Q. Did you observe whether there was any wire in the vicinity of the pond, or a fence?

A. There was. There was a fence about a foot and a half high.

Q. Of what material?

A. Chicken wire.

Q. Did you observe anything about that, whether it was laying or standing?

A. The fence was standing up all right, but the two sections towards the front of the house were smashed down.

Q. In what manner?

A. Pardon?

Q. In what way?

A. Well, they were just bent in toward the fish pond, the last two sections.

Q. Now, I show you People's Exhibit No. 10 for identification and ask you whether that is similar to the fence that was around that fish pond?

A. That is it, because I helped bring it in from out there.

Mr. Williams: May I have the exhibits, please, Mr. Moore?

[fol. 174] Q. I will show you now People's Exhibit 6 for identification and ask you to examine that and state whether that is the picture of anybody you knew?

A. I have seen it before and I say it is a likeness of Mrs. James.

Q. That was the Mrs. James you remembered carrying out that morning?

A. Yes, sir.

Q. The same woman whose foot was thrust into the box?

A. Yes, sir.

Mr. Williams: Have you gentlemen seen these pictures?

[fol. 175] By Mr. Williams:

Q. Now, Mr. Hope, I direct your attention to the drawing, People's Exhibit No. 1 for identification, and direct your attention to the kitchen. Was there in the kitchen, at the time that you went in with the box containing the snakes, a table?

A. Yes, sir.

Q. And where was that table located?

Mr. Parsons: Now, if your Honor please, not to interrupt unduly, but he is turning his head, and I don't hear a word now.

The Court: Mr. Hope, you will have to try to keep your voice up again. Keep this in mind: it really is harder to be heard in this courtroom than we ordinarily believe, so if you will do that.

The Witness: Now, the question?

By Mr. Williams:

Q. The question is where was the table at that time?

A. It was pulled out from between the—the table was pulled around here.

Mr. Clark: Is the witness designating a place where there is a door between——

Mr. Williams: He is indicating that it was pulled——

A. Between the breakfast nook and the dining room. There is the seat I set the box on, right here, (indicating).

Q. Indicating the more northerly of the two objects marked "Seat", which appear in the kitchen. I will now [fol. 176] show you a photograph and ask you whether you recognize that as anything which you saw at that time? Do you recognize it?

A. No, sir.

Q. You don't?

The Court: We will mark that photograph 12 for identification.

Mr. Williams: 12 for identification.

Q. How was the table set, with reference to whether it was in a north or south direction, or east or west direction?

A. Well, it was cater-cornered. The table was like this.

Q. Indicating that it was running from the southwest to the northeast?

A. Yes, sir.

Q. And at that time when you saw Mrs. James on that table, did you have a conversation with Mr. James, other than you have already stated?

A. None whatsoever.

Q. Did you have any conversation with him at any time on the subject of how she happened to be on the table?

A. In the garage, after he came out to give me the key to the car, yes, sir.

Q. What was that conversation?

A. I asked him how he ever got her on the table.

Mr. Clark: Just a moment.

A. I asked him how he happened to ever get her on the table, if she let him. He said he told her that a doctor was [fol. 177] coming out to perform some kind of an operation on her for pregnancy.

The Court: Just a moment, now. Let the record show that counsel indicated he desired to object before the question was answered, but counsel courteously permitted the witness to answer. Now, make the objection.

Mr. Clark: I object to it on the ground it is not a declaration in the course of the alleged conspiracy, but a statement or admission against interest, and not receivable for the purpose of proving the corpus delicti, and that the evidence is incompetent, and that no foundation has been laid for its introduction.

The Court: The objection will be overruled for the reasons previously stated, and other reasons.

By Mr. Williams:

Q. I show you now another picture, which I ask his Honor to mark No. 13 for identification.

The Court: 13 for identification.

By Mr. Williams:

Q. And ask you whether you recognize that as being a picture of anything you saw in connection with that transaction?

A. Yes, sir.

Q. What is that?

A. That is a picture of the bathroom, the hall, and the door leading off to the kitchen.

Q. And which is the door leading off to the kitchen?

A. The door over here.

[fol. 178] Q. On the right-hand side of the photograph?

A. On the right side of the photograph, yes, sir.

Q. Can you tell us whether that picture shows the place where Mary James' body lay when you went in at 6:30 or 7:00 o'clock in the morning?

A. Yes, sir.

Q. Where did it lie?

A. Right here, sir.

Q. Indicating the floor of the hall, immediately outside of the bathroom door?

A. Right, sir.

Mr. Williams: We offer this in evidence at this time, if your Honor please.

Mr. Clark: To which we object on the ground it is incompetent, and irrelevant, and that no foundation has been laid for its introduction, in that no showing has been made that that photograph has been accurately taken, or that it correctly depicts the conditions as they existed at the time of the alleged homicide.

The Court: I think your foundation might be laid a little further.

Mr. Williams: Does this picture, with the exception of the lack of a human body lying there, does the picture correctly depict the bathroom and hallway, and walls, and doors, as you saw them that morning?

Mr. Clark: Just one moment. That is objected to on the [fol. 179] ground that it is incompetent.

The Court: Overruled.

A. I couldn't say about the location of things in the bathroom. I wasn't in the bathroom, but the hallway looks the same, two rugs, and I couldn't identify any objects in the bathroom.

By Mr. Williams:

Q. You are pointing now to the cosmetic jars which appear in the bathroom?

A. Yes, sir.

Q. Except for those would you say that it is a correct depiction of what you then saw?

A. Yes, sir.

Mr. Williams: We offer it in evidence.

The Court: Objection renewed?

Mr. Clark: Yes, your Honor.

The Court: It will be overruled. Mark it 13 in evidence.

Mr. Williams: May I show it to the jury at this time?

The Court: Yes.

Mr. Barnes: May we have a recess, your Honor? The witness is apparently getting sick.

The Court: We will take a short recess at this time. We will take a recess for a few minutes, and the jury will heed the admonition heretofore given. They may retire to the juryroom.

(Recess).

Mr. Williams: Shall I proceed, your Honor?

[fol. 180] The Court: You may proceed. The record will show the parties present, all parties present. You may proceed.

By Mr. Williams:

Q. Mr. Hope, at the time that you had the conversation with James, immediately prior to your going out to Snake Joe's to get the snakes, was there anything said on the subject of what, if anything, you should say to Snake Joe?

A. That I was supposed to tell him they was to fight chickens and dogs.

Q. Is that all?

A. That is all I remember, yes, sir.

Q. Was there anything said on the subject of a bet?

A. No, sir. I think the bet was with a man in Ocean Park. I had lost my money in a poker game, and I was to win the money back by proving that his snakes were poison.

Q. Is that what James told you to tell the man?

A. That is what he told me to tell the man at Ocean Park, yes.

Q. And did you tell that to the man in Ocean Park?

A. I did.

Mr. Parsons: May I have the last question and answer, your Honor? I didn't quite get it.

The Court: Yes, you may read it, Mr. Reporter.

(Question and answer read by the reporter.)

Mr. Parsons: Thank you.

By Mr. Williams:

Q. I show you now a picture, and ask you if you recognize [fol. 181] that as anythiag that you saw during the transaction that you have been telling us about?

A. It looks like the garage at the James residence.

Q. And is that a correct representation of that garage substantially as it appeared at the time that you were out there on Sunday and Monday morning, August 4th and 5th, 1935?

A. Yes, sir.

Q. I observe a table in the left corner of this picture. Was that table there?

A. That was the table that the snakes and the dead chickens were on.

Mr. Williams: We offer this in evidence as People's Exhibit 14.

Mr. Clark: To which we object as incompetent, irrelevant and immaterial, and no foundation shown, and it has not been shown whether it was done by means of some photographic device to make it the way it is.

The Court: The objection is overruled. Mark it 14 in evidence.

Mr. Williams: May I show it to the jury?

The Court: You may do so.

By Mr. Williams:

Q. Now, Mr. Hope, after Monday, the 5th of August, 1935, when next did you see James?

A. I don't remember the exact date; I would say it was several weeks afterwards.

Q. Where did you see him?

[fol. 182] A. In the barber shop.

Q. Did you have a conversation with James at the barber shop when you saw him?

A. Oh, just the general topics of the day at that time, yes; nothing was said about this.

Q. Did you see him again after that?

A. Yes, sir, I saw him on several occasions.

Q. Well, did you have any conversation with him at the barber shop on the subject of this killing?

A. Yes, sir.

Q. When was that, with reference to the day of the killing?

A. I would say it was a month afterwards.

Q. And did the conversation take place in the barber shop?

A. Yes, sir.

Q. Just what was the conversation?

Mr. Clark: Just one moment; that is objected to on the ground that first it is apparently an attempt to prove a confession of the defendant without showing its free and voluntary character, and secondly, that no foundation has been laid for such testimony, in that the corpus delicti has not been established otherwise than by the statements or admissions of the accused, and that it is an attempt so to establish the corpus delicti.

The Court: The objection will be overruled. The latter [fol. 183] part of the objection does not have to be renewed. As to whether or not it is a confession, the Court is, of course, unable to determine in advance, and I merely say this to the District Attorney, the distinction between a confession and other extra-judicial declarations of the defendant is so clearly defined that if there is contemplated a confession, the foundation should be laid. With that statement, the objection will be overruled.

By Mr. Williams:

Q. State the conversation, Mr. James—or Mr. Hope, rather.

A. He told me he would give me $1,000.00 if we testified that we saw Mr. and Mrs. James married.

The Court: Just a moment. May I have that question read?

(Question read by the reporter.)

Mr. Clark: I move to strike that out, and ask that the evidence be stricken out, and the jury be admonished to disregard it, on the ground that it is an attempt to prove an offense other than that with which the defendant is

charged, and that it is irrelevant and incompetent to prove in this case.

The Court: Objection overruled.

Mr. Parsons: And motion denied?

The Court: And motion denied.

By Mr. Williams:

Q. By "we", whom do you refer to?

Mr. Clark: That is objected to on the ground that it calls for a conclusion of the witness.

[fol. 184] The Court: Sustained.

A. No.

Mr. Parsons: The witness' answer will be stricken?

The Court: Yes, the answer may be stricken.

By Mr. Williams:

Q. Did Mr. James say anything about "we", in using the expression "we"?

Mr. Clark: That is objected to on the ground that it is leading and suggestive.

The Court: Overruled.

A. He asked me if my wife and I saw he and Mrs. James married.

By Mr. Williams:

Q. Now, go on——

Mr. Clark: Of course, we persist in our objection.

The Court: I overruled the objection. The conversation thus far appears to be admissible.

By Mr. Williams:

Q. What was the rest of the conversation?

A. I told him "No", I wouldn't do it.

Q. Was that the substance of the conversation?

A. Yes, that was the substance of the conversation.

Q. Did you see him at a later time, and have another conversation with him?

A. Yes, sir.

Q. How long was that after the conversation that you have just related?

A. I don't know.

[fol. 185] Q. Well, do you know——

A. Well, it was sometime afterwards; quite a little while afterwards.

Q. Well, where did the conversation take place?

A. In the barber shop.

Q. What was said?

Mr. Clark: Just a moment. That is objected to on the ground that it is an attempt to prove a confession of the defendant without first laying the foundation therefor, by showing the voluntary character, and it is likewise an attempt to show the corpus delicti by statements of the defendant, and in both respects no foundation has been laid.

The Court: The objection is overruled, with the same comment as was made formerly.

A. I stopped in after work to get my hair cut, and after he had finished cutting my hair he slipped some money under the cloth, and put some money in my hand.

By Mr. Williams:

Q. How much?

A. It was $100.00, and he said, "Don't remember anything about me, and I advise you to get out of town."

Mr. Clark: I move to strike that out as incompetent, irrelevent and immaterial.

The Court: The motion is denied.

By Mr. Williams:

Q. Did he say anything else at that time?

A. Well, the shop was full of people. He said, "Don't [fol. 186] try to give it back to me; somebody will see you, and you will get us all in bad."

Q. Was that the entire conversation as you now remember?

A. That is all.

Q. I will show you now a blue blanket, and ask you whether you recognize that?

A. Yes, sir.

Q. What is it?

A. A blanket that I got from Mr. James.

Q. On the 5th of——
A. On the 5th of August.
Q. 1935?
A. Yes.

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[fol. 187] By Mr. Williams:

Q. I will show you now a pink blanket, and ask you whether you recognize that?
A. Yes, sir.
[fol. 188] Q. When and where did you see that?
A. In the James residence on August 5th.
Q. Is that one of the blankets that you took from your house to his house?
A. Yes, that is one of the blankets that went to the laundry.

Mr. Williams: We offer it in evidence at this time.
Mr. Clark: We object to it on the ground it is incompetent, irrelevant and immaterial, doesn't tend to prove any of the issues in this cause and that no foundation has been laid for its introduction, in that it has not been in any way identified as having any connection with the death of the deceased or with any of the facts in this case.
The Court: Objection overruled. Mark it 16 in evidence.
Mr. Williams: I show you now a tan colored blanket and ask you whether or not you recognize that?

A. Yes, sir, that was obtained at the same time and place.

Mr. Williams: I offer it in evidence.
Mr. Clark: Same objection as just stated.
The Court: Same ruling, overruled. Mark it 17 in evidence.
Mr. Williams: Mr. Kirby, will you stand up?

(Gentleman stands up in court room.)

Mr. Williams: Mr. Hope, do you recognize this gentleman that just stood up?
A. Yes, sir.
[fols. 189-190] Q. When and where did you first see him?
A. I saw him in Long Beach, the latter part of June. I purchased three snakes from him.

Mr. Williams: Sit down, Mr. Kirby. Mr. Allman, stand up.

(Gentleman stands up in courtroom.)

Mr. Williams: Do you recognize this gentleman?

A. Yes, he runs the snake pit at Ocean Park. I also purchased a snake from him.

Q. Was he the gentleman that was present when you and James were at that snake pit?

A. Yes.

Mr. Williams: Joe Houtenbrink, stand up.

(Gentleman stands up in courtroom.)

Mr. Williams: You are known as Snake Joe, are you?

Mr. Houtenbrink: Yes, sir.

By Mr. Williams:

Q. Do you recognize this gentleman?

By the Witness:

A. Yes, sir.

Q. Where did you see him?

A. I saw him on the 3rd day of August, in the afternoon. I purchased two snakes from him.

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[fol. 191] Doctor A. F. Wagner, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Doctor A. F. Wagner.

Mr. Clark: If your Honor please, I have known Doctor Wagner as an autopsy surgeon in Los Angeles County now for exactly 20 years. There will be no question as to the competency of Dr. Wagner as a medical expert.

Direct examination.

By Mr. Williams:

Q. Dr. Wagner, did you prepare an autopsy on the body of one Mary Emma Busch James?

A. I did.

Mr. Clark: Just one moment; I would like to move to strike all of that out for the purpose of making an objection.

The Court: People vs. Smith?

Mr. Clark: Yes, your Honor.

The Court: Objection sustained.

By Mr. Williams:

Q. Did you perform an autopsy on the body of a woman shortly after the 5th of August, 1935?

A. I did.

Q. I will show you now a picture that has been received for identification as People's No. 6 in this case, and ask you to examine that and state whether or not that is the picture of the body upon which you performed the autopsy?

[fol. 192] A. It is.

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By Mr. Williams:

Q. Doctor, when did you perform that autopsy?

A. On August 5th, 1935.

• • • • • • •

[fol. 193] By Mr. Williams:

Q. Just state the examination you made, and the determination you made as to the cause of death?

Mr. Clark: To which we object on the ground that no foundation has been laid.

The Court: Objection overruled.

Mr. Williams: I didn't catch your Honor's ruling?

The Court: Overruled.

A. There was the laceration on the plantar surface of the left great toe. The left foot was considerably swollen. On opening the body I found the lungs containing a considerable amount of water. There was no disease of any of the vital organs. The uterus showed a normal pregnancy of about six weeks duration. Superficial bruises of varying extent were found on the various parts of the body. A chemical analysis of the stomach, liver and kidneys was made, but no poison found.

By Mr. Williams:

Q. What conclusion did you reach as to the cause of death?

A. The cause of death was drowning, and an acute cellulitis of the legs.

Q. Will you explain to the Court what you mean by "acute cellulitis"?

A. Well, it is that disturbance of the legs of a swollen condition. It may be due to anything of a microorganic nature.

[fol. 194] Q. In this case what was the extent of the swelling?

A. The swelling was up to the hip. The discoloration was up to the knee.

Q. What was the extent of it?

A. Up to about the knee.

Q. Slight or——

A. Quite marked.

Q. What was the date upon which you performed this autopsy?

A. August 6th.

Q. Did you observe the location and character of the bruises which you observed upon the body?

Mr. Clark: Just one moment. That is objected to on the ground that it assumes a fact not in evidence.

The Court: Sustained.

Mr. Williams: I didn't catch the objection?

The Court: It admits bruises were found.

Mr. Barnes: He has testified that there were bruises on various parts of the body.

By Mr. Williams:

Q. Well, did you observe bruises on various parts of the body.

A. I did.

Q. Where were the bruises?

A. The bruises were on the interior portion of the right arm, and the chest——

Mr. Clark: May I apologize, but I must have overlooked [fol. 195] that part of the witness' testimony.

A. A slight bruise or scratches on the left arm, and there were quite a few superficial scratches on the fore-

head, and face, on cheek, and on the right arm, and the contusion that I have already stated extended around to the back of the arm. Then there were also the discoloration of the back of the leg up to the knee.

The Court: Which leg, Doctor?

A. The right leg, and when the body came into the morgue, the skin had slipped off half of this left leg.

By Mr. Williams:

Q. Any other discoloration?

A. On the back of the right arm, as I already stated.

Q. Now, referring again to People's Exhibit No. 6, I will ask you whether the discolorations which appear upon that picture are discolorations which you noted at the time of your performance of an autopsy?

A. Yes, sir.

Q. That is, so far as the front of the body is concerned?

A. Yes.

Q. I will call you particular attention to the left leg as shown in People's Exhibit No. 6, and ask you whether that shows a discoloration of the left leg?

A. It does not disclose it to the same extent that I actually saw it with my eyes. It is still there, but for some reason or other the light on the photograph made the whole lower part of the body fairly white.

[fol. 196] Q. Now, have you any opinion as to what might have been the cause, or may have been the cause of the acute cellulitis which you observed in the left leg and foot?

Mr. Clark: Just one moment. That is objected to upon the ground that it calls for surmise and speculation, and that it is incompetent.

The Court: Objection overruled. It appears to be a matter to which a medical expert should testify, being a condition not normal to the human system.

A. Cellulitis is always due to an infection of some kind, whether animal or vegetable; usually it is bacteria.

By Mr. Williams:

Q. Name some of the specific causes which might produce a condition of cellulitis, such as you observed in this particular body?

Mr. Clark: That is objected to on the ground that it calls for conjecture, surmise and suspicion. The Doctor can have no means of knowing what did cause it, other than as he stated, and it would be manifestly unfair for him to take three or four of the causes, specific things that might have been. The evidence is utterly incompetent.

The Court: Objection overruled. You may answer, Doctor.

A. I could mention the ordinary organisms that cause blood poison, like staphylococcus, and others with similar long names. Those organisms enter the body through a laceration anywhere, large or small. They cause a certain swelling, and a certain amount of inflammation, as this ap- [fol. 197] pears to be.

By Mr. Williams:

Q. Now, in case of a swelling, or a cellulitis caused from such a condition as you have just described, in reaching the proportions you observed in this body, what would be the normal length of time from the inception of the infection until the cellulitis would have reached the extent that it did in this particular individual?

Mr. Clark: That is objected to on the ground that it is not a subject of expert opinion, and that it calls for surmise or conjecture on the physician's part, in a matter in which anything other than surmise and conjecture would call for conditions not known to the witness.

The Court: Objection overruled.

A. I have forgotten the question.

The Court: Read the question.

(Question read by the reporter.)

A. Those causes that I referred to as being bacterial infection, that would take anywhere from two to three days to a week, but I didn't state all the causes. The animal poisons go much faster, because that is mostly all poison.

By Mr. Williams:

Q. What are the animal poisons which would produce such a cellulitis as you here found?

Mr. Clark: That is objected to upon the ground that no foundation has been laid for the introduction of such testi-

mony, in that it has not been shown that there is animal poison which causes the cellulitis in this case, and that it [fol. 198] is incompetent.

The Court: Of course, it could not be proved that that situation existed without some testimony. The Doctor did testify, however, that that condition might be due to one or two causes. Objection overruled.

A. The venoms of insects and snakes, spiders, and so forth.

By Mr. Williams:

Q. Is this the type of cellulitis which would be caused by the venom of a rattlesnake?

Mr. Clark: Just a moment.

The Court: That question is a little ambiguous in form, Mr. Williams.

By Mr. Williams:

Q. Could the cellulitis which you found in this body have been caused by the bite of a rattlesnake?

Mr. Clark: That is objected to upon the ground that the evidence is incompetent, remote, speculative, and conjectural, and that no foundation has been laid for its introduction.

The Court: Objection overruled.

A. It could have been.

By Mr. Williams:

Q. Now, Doctor, at a time subsequent to the date of the performing of an autopsy upon this body, did you again examine the body?

A. Yes, sir.

Q. When was that?

A. On the 5th day of May, 1936.

Q. In the meantime had the body been interred?

[fol. 199] A. Yes, sir.

Q. And when you examined it on that date was there anybody with you who participated in the examination?

A. Yes, sir, Dr. Boehme.

Q. And of what did your examination consist on the 5th day of May, 1936?

A. Why, we examined this left leg, the whole of the left leg.

Q. And what did you find?

A. My notes on that occasion were brief. This body was exhumed and reexamined on the 5th day of May, 1936, at about 10:00 A. M., with Dr. Boehme present. There were no new facts revealed.

Q. Now, did you at that time make any special examination of the incision that you had observed on the plantar surface of the great toe of the left foot?

A. We did.

Q. Did you reach any conclusion as to what had caused that incision?

Mr. Clark: Just answer that "yes" or "no".

A. Not a definite one, no, sir.

By Mr. Williams:

Q. Did you reach a conclusion as to what could have caused such an incision?

Mr. Clark: Just one moment. We object to that on the ground that it is incompetent, irrelevant and immaterial. No doubt a thousand things could have caused it. The only [fol. 200] question here is what did cause it.

The Court: The objection will be overruled. I don't think it is necessary to the admissibility of evidence that an expert, or autopsy surgeon particularly, is required to state positively that a particular, definite thing caused the condition. I think it is permissible for him to state that it might be caused by two, or three, or four things. Objection overruled.

[fol. 201] A. I forget just what form the question was.

(Question read by the reporter.)

A. Well, as I said before, it was a puncture laceration which of course was seen at the time of the second autopsy, although not quite as plainly as it was at the first.

Mr. Williams: Did you definitely form the opinion that there was a puncture?

A. Yes, sir.

Q. And in your opinion, taking into consideration the character of the wound and the effect of it in the acute cel-

lulitis that that wound and its effect had been caused by the bite of a rattlesnake?

Mr. Parsons: Just one moment; that is objected to upon the ground that it is leading and suggestive.

The Court: There is another objection, that might be urged. Perhaps the Court may be in error in this, but it is my inclination to feel that there should be some foundation laid showing that the witness is familiar with the appearance of the bite of a rattlesnake or the nature of it, either by actual observation or by reading or other acquired knowledge.

Mr. Williams: Do you have any knowledge of the appearance of the bite of a rattlesnake?

A. I have.

Q. Tell us how you acquired that knowledge.

A. I have never been bitten by a rattlesnake, nor have I ever seen anybody bitten, but the puncture, of course, is [fol. 202] a puncture that penetrates just the same as a nail or anything else. This was a puncture wound, and then there was a laceration of about a quarter of an inch leading away from it. Now then, from the description of the bites as shown in the literature one could come to the conclusion that it could have been made by the bite of a rattlesnake or anything else that would have a similar instrument for making such a puncture laceration.

Q. Did you reach such a conclusion?

A. I did.

Mr. Williams: May I, at this time, if the Court please, exhibit People's No. 6 to the jury?

The Court: I think I would defer that for the present, Mr. Williams.

Mr. Williams: You may cross examine.

Cross-examination.

By Mr. Clark:

Q. Doctor Wagner, I notice you have been referring to some paper as you have been giving your testimony. I assume that the paper you were using consisted of your notes made contemporaneously or nearly so with the time that you made the observation?

A. Yes, sir.

Q. And it has been necessary for you to refer to those notes in order to testify accurately, I take it?

[fol. 203] A. To testify accurately, yes sir.

Q. Where was it that you first saw the body upon which this autopsy was performed?

A. Down in the morgue.

Q. I take it that you first saw it on the day of the autopsy, August 6th?

A. Yes.

Q. What time of the day did you see it?

A. I may have seen it earlier than I performed the autopsy, but the autopsy was performed at 3:00 P. M. on the 6th day of August, 1935.

Q. And you have no means of knowing how long the body had been in the morgue at that time, have you?

A. Yes.

Q. How long?

A. The body was brought into the morgue at 12:30 A. M.

Q. That would be half past 12:00 on the morning of the 6th?

A. Yes, sir.

Q. Now, there at the morgue, Doctor, were steps taken to arrest decomposition of this body?

A. Well, the body was embalmed at 10:30 A. M. of that day.

Q. And embalming fluid was used for that?

A. Yes, sir.

Q. And before that the body was kept in a cold place in the morgue, wasn't it?

[fol. 204] A. No, I don't think so. I have no knowledge about that. The bodies are brought in, and when they are brought in they are put on a slab and then as the men can get time to get at them, why they take them as they come and embalm them.

Q. What kind of a slab is that?

A. Just an iron table, porcelain and iron.

Q. Now, the time of the autopsy was pretty warm weather, was it not, Doctor?

A. I don't remember that; I didn't make a note of that.

Q. What I am trying to get at, is, to what extent, if any, had decomposition set in, when you first saw the body?

A. No decomposition.

Q. Decomposition progresses somewhat more rapidly in warm weather than in cold, does it not?

A. Yes, but it is not very warm down in our morgue. The temperature is very uniform.

Q. That is what I tried to get at a moment ago, and for that reason I tried to fix as accurately as possible the time when the body came into the morgue. You have no means of knowing how long the body may have been exposed to the open air before it came into the morgue, have you, Doctor?

A. No.

Q. If the body was exposed to the air in warm weather, decompcsition at that time of the year, with the temperatures that prevail there, would progress rather rapidly, would it not?

[fol. 205] A. Yes, but there was no manifest decomposition here.

Mr. Parsons: May I have that answer read, please?

A. There was no manifest decomposition.

Mr. Clark: As bearing upon the matter of decomposition, the presence of open wounds is to be taken into consideration, isn't it? That is, where there are open wounds magots are likely to get in them in a few hours, aren't they?

[fol. 206] A. Small wounds don't show much decomposition. We have bodies lying down there for quite a while, and it doesn't seem to progress.

Q. Did you form any opinion at the time you performed this autopsy as to how long the woman had been dead?

A. Only in a general way. In fact, I didn't give it much thought.

Q. As a matter of fact, there were no conditions from which you could form a close opinion, were there?

A. No, except it had not been dead long.

Q. What would you think, in your opinion, as the maximum time that the body could have been dead?

A. That body could have been dead from 12 to 24 hours. I could not fix any definite time.

Q. I believe you stated that in your opinion the cause of death was drowning?

A. Yes, sir.

Q. And will you just tell the jury why you fix drowning as being the cause of death?

A. Well, these lungs were more filled up with water than we usually find even in drowning, that is, in the usual cases

of drowning. The lungs were filled up, practically, with water, and in such a case, of course, that causes death.

Q. As I understand it, the lungs are a spongy matter that expand and contract as we take in a supply of air?

A. Yes, sir.

[fol. 207] Q. That is one of their principal functions?

A. Yes, sir.

Q. Taking in the oxygen which is necessary for combustion in the body?

A. Yes.

[fol. 208] Q. And when a person's lungs become filled with water, the air is cut off by the water?

A. Yes, sir.

Q. The water is taken into the lungs by the movement of the lungs in contraction, is that right?

A. That is right.

Q. So that, if the body were already dead, you wouldn't expect to find water in the lungs. You wouldn't expect to find water in the lungs?

A. No, sir.

Q. Those are the facts and the process of reasoning upon which the death was caused by drowning?

A. Yes, sir.

Q. Now, just a few questions in regard to the cellulitis. You say cellulitis is the result of bacterial action?

A. Yes, sir.

Q. It is true that some strains are very much more virulent than others?

A. Yes, sir.

Q. So that a period exists when bacterial disease depends very largely on the virulence of the bacteria?

A. Yes, sir.

Q. So that if the virulence was caused by bacteria you would have to know two things, the kind of bacteria and how virulent they were, in order to know how long it would take to produce the swelling and discoloration, isn't that true?

[fol. 209] A. It would.

Q. Now, in the course of your medical experience you have seen such cellulitis developed from a dog bite, within a few hours?

A. Not to that extent.

Q. You have seen it enough to swell a man's shoulders in half a day?

A. Well, half a day, it would have to be quite virulent.

Q. And also more than that with flies, haven't you, Doctor?

A. Well, that is different then, yes.

Q. You cannot tell what the flie- may be carrying and put in an open wound?

A. Yes, but it doesn't cause the whole limb to be swollen in a short length of time. If infection starts right away, it has to take some time before it is manifest to the eye.

Q. Well, you have seen a snake's fangs, haven't you, Doctor?

A. Have I what?

Q. You have seen a rattlesnake's fangs.

A. Yes, I have but——

Q. And they are slender, curved almost needle pointed, aren't they?

A. Some are and some are straight. There are different kinds of fangs and different species of snakes.

Q. And could you tell whether the puncture that you saw made by a rattlesnake's fang, a dog's tooth, a needle [fol. 210] or a sharp pointed article was different from a fang?

A. It would not include anything and everything. It must conform to something that might have made this cut.

Q. It might have been made from a thorn?

A. As far as I could prove it; I couldn't say which.

Q. Now, referring to animal poison——

The Court: Before we get into that, it is so close to the noon hour, that I think we had better take a recess.

Mr. Clark: Yes, I think so. My examination will take four or five minutes longer.

* * * * * * *

[fol. 211] Q. Doctor Wagner, when you performed the autopsy on this woman, you made an inspection of the vital organs, did you not?

A. Yes, sir.

Q. That included stomach, of course.

A. Yes, sir.

Q. You made no chemical or other tests of the contents at that time, did you, the contents of the stomach?

A. The stomach and kidneys particularly, at that time.

Q. And what, if anything did you ascertain with regard to the presence or absence of alcohol in the stomach?

A. There was none found.

Q. Now, something has been said here with regard to animal poisons. By that you mean to include all members of the animal kingdom as distinguished from bacteria, don't you?

[fol. 212] A. Those that form venoms.

Q. That embraces such things as ants, bees—we will cut out bees. Ants, snakes, scorpians, tarantulas, spiders, gila monsters and everything of that sort?

A. When we are making a general statement, yes, that is true.

Q. Now, there is nothing disclosed by your examination that would enable you to even form an opinion from the examination, aside from what was communicated to you by others, as to whether this cellulitis was caused by animal poison or bacteria, was there?

A. To distinguish between animal poison and bacteria at that time I could not make any distinction.

Q. You say you could not at that time. Did you afterwards make any other examination by which you could?

A. Just to examine the wound you couldn't, but you could not include all the things like you mentioned, like ants and things that wouldn't make any mark like that. It would have to be something that would make a small laceration but still more extensive than an ant or a bee would make.

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By Mr. Clark:

Q. Now, during the course of your testimony you not only referred to your written memoranda made at the [fols. 213-219] time of your examination, but you stated orally all of those things that you had recorded in that memorandum, did you not?

A. I stated orally all that I recorded in the memorandum?

Q. Yes, in other words, you virtually read the memorandum and testified to it?

A. Those were the notes I made.

Q. You virtually read aloud the memoranda as you gave your testimony?

A. Yes, sir.

Q. And you repeated everything that you observed as you regarded it as being significant?

A. Well, we do not go into everything, no, but we go into the main facts with the notes.

Q. Well, do you now remember any other notes that you regarded as significant, other than those in the memorandum?

A. That are significant, no.

* * * * * * *

[fol. 220] Q. You made no written memorandum concerning a snake bite at the time of that examination, did you, Doctor?

A. I never thought of it.

* * * * * * *

[fol. 221] By Mr. Clark:

Q. Referring now to People's Exhibit 6, Doctor, with the photograph facing us, I understand the left leg to be the one nearest the right?

A. Yes sir, that is the left leg.

Q. And it appears in the photograph to be larger than the other, it would seem that way to you?

A. Yes, sir.

Q. And you, as I understood your testimony, you followed the discoloration and believed it to be more extensive than seems clearly depicted from the photograph?

A. Yes, I did.

Q. And it was by reason of the extent of the discoloration that you thought the puncture, or that the cellulitis was more probably caused by some form of animal poison, is that right? Please read the question, Mr. Person, I formed it somewhat hurriedly.

(Question read by the reporter.)

Mr. Clark: Let me withdraw the question and reframe it.

Q. It was because you thought the discoloration was greater than would be the case as the result of a bacterial [fol. 222] action, that you formed the opinion that the cellulitis was probably caused by animal poison, Doctor?

A. Yes.

* * * * * * *

Q. Now, the cellulitis introduced in the body, the extent of their effect depends very largely on what kind of bacteria they are and how much they multiply?

[fol. 223] A. Yes, it depends upon that.

Q. And when you do not know how long they have been in the body, you cannot tell how rapidly they have multiplied?

A. No.

Q. And it is common practice, with bacteria causing greater trouble?

A. The extent of the area involved with a big purplish discoloration, still makes my answer to your question good, that it would confirm more to the point in the development of the toxin of bacteria.

[fol. 224] Q. Doctor, you have to examine a patient for blood poison?

A. By "blood poison" you mean blood poison.

Q. And in those cases sometimes the discoloration extends the entire length of the limb, doesn't it?

A. Then that is gangrene.

Q. Gangrene is simply a further result of the bacterial action, isn't it?

A. Yes, in some cases bacteria causes gangrene, and in others gangrene is caused by inflammed tissue, the tissue being inflammed first, and then gangrene following secondary.

Q. And, Doctor, I find it necessary again to refer for a moment to People's Exhibit 6, being the photograph we were looking at. The dark spots upon the body I take it, near the neck and shoulders, are some of the bruises that you noticed when you saw the body, am I correct?

A. Yes, sir.

Q. Those bruises were indicated upon the body by discoloration?

A. Yes, sir.

Q. Now, in other words, there were black and blue spots?

A. Yes.

Q. Now, am I correct in my understanding that those black and blue spots are caused by a rupture of the smaller blood vessels, and the blood exuding out into the surround-
[fol. 225] ing tissue?

A. That causes the condition, yes, sir.

Q. When a person dies the circulation of the blood is stopped?

A. Yes.

Q. Does a dead body bruise like a live body?

A. No.

Q. Then your inference in regard to the bruises is that the body was alive when the bruises were placed upon the body, is that correct?

A. Absolutely.

Q. Directing your attention to the right arm, there seems to be quite an extensive area of discoloration apparent there. Was there actual discloration, or is that a shadow made in taking the photograph?

A. No, that is an actual discoloration, and extended around to the back of the arm.

Q. Now, that would be a discolored spot approximately as large as one's hand, including the fingers, would it, Doctor?

A. Yes.

Q. Is that about a fair estimate?

A. I think so.

Q. Did you make any examination to see how deeply that bruise had extended?

A. Yes. They weren't very deep.

Q. They were superficial bruises?

[fol. 226] A. They were down into the subcutaneous tissues.

Q. By the way, the body was that of a well-nourished woman, was it not?

A. Yes.

Q. Rather inclined toward being stout, would you say?

A. She only weighed 128 pounds, and her height is 5 feet 9½. She was not stout at all. She didn't look emaciated.

Q. Such superficial bruises don't necessarily imply exertion of great force, do they, Doctor?

A. They imply exertion of sufficient force to produce them, and that means breaking of the capillaries and smaller blood vessels in the tissues.

Q. Sometimes with some people that is accomplished with very small force, is it not, Doctor?

A. I seldom find it, except in the aged, or those who have been subject to prolonged disease.

Q. Now, I am not withholding this photograph from you to deprive you of any refreshment it may give you. If you wish to see it, just speak. But you also noticed some marks and scratches on the person, didn't you?

A. Yes.

Q. Those were about the face and head particularly, were they not?

A. Yes, sir.

Q. And those were placed where the blood had come to the surface, where the skin had been severed?

[fol. 227] A. Some of them. There was one in the forehead.

Q. You formed an opinion from that circumstance that those cuts or scratches had occurred before life was extincted, did you not?

A. Yes, sir.

Q. Now, in making your examination you examined somewhat the mouth and nostrils, didn't you?

A. Just from the outside. I didn't open the mouth or the nostrils.

Q. Did you notice anything in regard to either the mouth or the nostrils, other than the usual condition of mouths and noses of dead bodies?

A. I did not.

Q. In the course of the practice of your profession you have occasion to bandage various parts of the body, don't you, Doctor?

A. In my profession as autopsy surgeon?

Q. Yes, in your practice outside of your official work?

A. Oh, before I did this work, yes, I used to use bandages at various times, and for various purposes.

Q. There is a substance called "adhesive tape" that is sometimes used for the purpose of drawing the edges of wounds together, and things of that sort, is there, Doctor?

A. Yes, sir.

Q. That has some kind of a coating which causes it to adhere rather firmly to the flesh, doesn't it?

[fol. 228] A. It does, to the skin.

Q. Yes, to the skin, I should have said. Thank you. And where adhesive tape has been applied to the skin you have to make use of some chemical substance to pull it off without pulling off some of the hairs of the skin, also?

A. Well, that is sometimes *y*sed. Sometimes you just rip it off.

Q. When you rip it off it leaves its mark for a time, doesn't it?

A. It does if you have it on there for any length of time, but to take it off soon, it doesn't leave much of a mark.

Q. You saw on the mouth of this body no such mark as is made by the removal of adhesive tape, did you?

A. I did not.

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[fol. 229] Q. Dr. Wagner, you didn't find anything in the [fol. 230] cellulitis that would negative it having been caused by a black widow spider, did you?

A. Well, I haven't seen any black widow spider bites, but I have had them described to me by persons who have been bitten. I don't know just how a black widow spider infection will spread, or the discoloration. I believe there is some swelling and discoloration there. I am not competent to make the distinction between the two.

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Dr. Gustave F. Boehme, called as a witness in behalf of the People, being first duly sworn, testified as follows:

* * * * * * *

Direct examination.

By Mr. Williams:

Q. You are a physician and surgeon regularly licensed to practice as such in the State of California, are you, Doctor?

A. I am.

Q. How long have you been a physician and surgeon?

A. Since 1910.

Q. How long have you been practicing in the State of [fol. 231] California?

A. Since 1921.

Q. Do you now have an office in the City of Los Angeles?

A. I have.

Q. Have you made any study of the subject of snake bites, and their effect?

A. As a hobby, for a good many years.

Q. When did you first start making such study?

A. About 1904, when I worked in the College of New York. I kept that up until I came out of medical school in 1910, and from time to time. I went down to Dr. Harry Egbert's place in San Diego, and went over his snakes with him. Then I was very much interested in the Eastern snakes, and especially of Charles Lindley, a physician there, and literature on the subject. I personally have been bitten by a snake, and I have seen others that have been bitten.

Q. Have you treated snake bites?

A. Once upon a patient, and once upon myself.

Q. You say you have made some study of the literature, as well?

A. Yes, I have.

Q. Did you make an examination of the body of a woman in conjunction with Dr. Wagner, on the 5th of May, 1936?

A. I did.

Q. Just state what examination you made, and what you saw?

A. The body was brought to the morgue, and Dr. Wagner [fol. 232] did the actual physical work. The bandages were removed from both legs, and it was then noted immediately that the left leg was very much enlarged in circumference as compared with the right. It was markedly discolored, almost mahogany in color. There was in the back of the calf an area of incision which Dr. Wagner had made when he studied the case in the first place. There was some swelling of the lesion from the knee up to the hip. The superficial material which had accumulated on the limb was then removed by Dr. Wagner by a rag and a knife. At the base of the great toe, on the left side, toward the median side, there was present, running across the great toe an old laceration wound approximately a quarter of an inch in length.

Q. Did you examine that?

A. We did.

Q. Did you form any opinion as to what was the cause of it?

A. So far as the wound, itself, was concerned, it could have been caused by a number of different things. It could have been caused by laceration; it could have been caused by snake bite; it could have been caused by some other method, but combining it with the other findings in that, I did come to an opinion.

Q. What is that opinion?

A. That opinion was that probably this woman's toe had been bitten by some venomous creature, probably a snake, [fol. 233] and all the other findings on the leg were compatible with such a finding.

Q. Now, give the reasons on which you formed that opinion?

A. In the first place, a snake bite travels by the lymphatics, and not so much by the blood vessels, which give at first localized pain, then progressive localized swelling,

which travels upwards on into the limbs. The snake venom acts on the blood vessels to produce these large black and blue areas, which are known as ecchymosis to the profession. And with all of these physical findings corresponding to a snake bite on this woman's leg, I felt it was a probability.

Q. Was the incision of such a character as in your opinion can be caused by a snake's venom?

A. Yes, it was such as could be caused by a fang striking at an angle, perhaps.

Q. Do you have any knowledge of the effect of snake bite upon the individual who is bitten, whether it causes or does not cause pain, or as to the character of the pain?

A. Well, the effect of the snake bite depends upon the location and the structure struck. When the face, or the buttock is struck, there is a large blood supply, and if the snake hits directly into a large field of blood vessels, rapid absorption takes place, and then the patients have a rather rapid death, probably three or four hours in some instances. [fol. 234] As a general rule the snake bites into the leg or arm. When it does this, unless a large blood vessel is struck, there is immediate pain at the site of bite. The pain is very marked, and then as the poison travels through the lymphatics and is gradually absorbed by the blood vessels you have all of these local changes I have described. Then we have the effect on the blood vessels and on the central nervous system and finally death. In the majority of instances death is from the heart, but in some instances it is a respiratory death.

Q. In what length of time in the case of a bite on the great toe, within what limit of time would death probably result?

A. Well, a good deal depends upon what dose the patient gets of the poison. Ordinarily a snake bite will, within two hours, produce considerable swelling and pain. At the end of four hours you will notice some of the ecchymotic pain. Then if the patient is properly protected it may stop. If the patient is not protected, then the poison is absorbed and in a period of from 16 to 24 hours death occurs.

Q. Would the fact that a snake bite was in the great toe, rather than higher up on the leg, have any effect upon the rapidity with which death would be caused?

A. Yes, it would. It would slow up the absorption.

Mr. Parsons: May I have that last answer, your Honor?

(Question and answer read by the reporter.)

[fol. 235] By Mr. Williams:

Q. Do you know whether snake bite causes pain in the individual who is bitten?

A. It does.

Mr. Parsons: Just a moment. What was that question?

Mr. Williams: Whether snake bite causes pain?

A. It causes intense pain.

Q. Does that pain continue throughout the length of time from the time of the bite until death ensues?

A. I don't know that definitely, Mr. Williams.

Q. Now, Doctor, did you, at my request, attend at the office of the District Attorney a few days after the 5th of May, I think it was, and were you present there while some venom was removed from two snakes by a man whom you knew as Snake Joe?

Mr. Clark: Just one moment, that is objected to on the ground that it is irrelevant to all of the issues in this case.

Mr. Williams: It is preliminary.

The Court: I think I will permit the question to be answered.

A. I did attend such a session.

By Mr. Williams:

Q. And at that time, was the venom removed from two snakes in your presence?

Mr. Clark: Just one moment; that is objected to on the ground that it is incompetent, irrelevant and immaterial and if it is for the purpose of showing that these particular [fol. 236] snakes that feature in the testimony here were capable of producing the venom, I object to it on the further ground that it is remote, incompetent and I offer to show by voir dire examination of this witness that he could not tell as to what the conditions might have been at the time of the alleged death of this person.

The Court: I don't think that would be determinative of the question. I am rather in doubt, however, as to the direction in which the examination is leading us.

Mr. Clark: May we approach the bench?
The Court: Certainly.

(Following discussion was had at the bench out of the hearing of the jury:)

Mr. Williams: I intend to prove that the two particular snakes which were purchased at Snake Joe's and thereafter returned to him are the snakes from whom venom was removed. One of those snakes is the one which bit Mrs. James. I intend to establish that the venom from each of those snakes was taken separately and the venom of each of those snakes was injected into a guinea-pig and it was entertained that the guinea-pig died with the characteristic symptoms of snake bite within a certain number of minutes after the injection of venom of each of the snakes into the pigs, the venom of one snake into one pig and the venom of another snake into another pig, for the purpose of showing that these particular snakes were of the type and character which carried venom. The experiment was made by [fols. 237-240] Doctor Boehme and it is through him I intend to prove the effect on the guinea-pigs and the autopsy which he performed on the guinea-pigs.

Mr. Clark: In the first place, there is so far no evidence that Mrs. James was ever bitten by a rattlesnake unless it be a circumstance——

The Court: I think the evidence is sufficient here to say that an inference of that sort can be drawn. It may be debatable

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Mr. Clark: The defendant is presumed to be innocent, and the circumstances must be sufficient to support the inference to be drawn. I find no circumstances under which it can be inferred that this woman was ever bitten by a rattlesnake, nor do I find any circumstances from which it can be inferred that the rattlesnakes were in the same condition in the early part of August of last year that they were at the time that these experiments were performed.

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[fol. 241] By Mr. Williams:

Q. Doctor, shortly after the 5th of May, 1936, in the office of the District Attorney, in this County, in your presence,

did the man that you know as Snake Joe extract the venom separately from two rattlesnakes?

Mr. Clark: It is after the conference, and in line with the objection that we expressed to your Honor, that it is being mentioned, with reference to all the testimony concerning any of this venom, and any experiments that were made with them.

The Court: The objection is overruled.

A. I did.

By Mr. Williams:

Q. And how was that rattlesnake venom extracted from the snakes?

A. The snakes' fangs were driven into a bottle that was covered with a piece of rubber, and the fluid from the fangs was allowed to enter into the bottle, itself, and some, of course, accumulated on the rubber.

Q. Was the venom from each fang put in a different bottle?

A. Yes, sir, it was put in a different bottle.

[fol. 242] Q. And what, if anything, was done with the bottles?

A. The bottles were taken by me and examined that night.

Q. Do you remember the date of this examination?

A. On May 7th, if I remember correctly.

Q. May 7th?

A. Yes, sir.

Q. And what did you do with that venom?

A. The one snake had fairly good fangs, and we got practically pure venom. That venom, a portion of it, was injected into the interior abdominal wall of a rabbit—or rather, a guinea pig, weighing 508 grams. From the other snake we didn't get as much, and I diluted that with a normal salt solution, and that was injected into the other guinea pig.

Q. What happened to the guinea pig after you injected the venom?

A. The pig gave a jerk, and gave a squeal of pain, and there was a marked twitch as some poison affected the creature, and then after a while the little guinea pig would twitch, and in about twelve minutes would fall over, and after ten minutes try to rise, and was not able to do so and gradually the respiration began to slow up, as did

the beat of the heart, and in 29 minutes all evidences of life had passed.

Q. Did you thereafter perform an autopsy on the body of the guinea pig?

[fol. 243] A. Yes, the next day.

Q. What did you find?

A. The whole region where the injection had occurred, all of the abdominal wall had been accumulating a black and blue, and then when we went into the abdominal cavity, the intestines were in sharp contraction, and also the intestines being blackish, and discolored, and the stomach the same way. The lungs show a large amount of blood in them, and the heart was down; something caused a sharp contraction of the heart.

Q. Did you form an opinion as to the cause of the death of that guinea pig?

* * * * * * *

A. The case of the guinea pig, in the absence of any other kind of poison, was rattlesnake venom. This guinea pig had the weaker venom solution, although he had the same grade of pain, and the same series of convulsions, and in 20 minutes they were able to get him up from time to time, and finally in one hour and nine minutes it was dead.

By Mr. Williams:

Q. Did you perform an autopsy on the second guinea pig?

A. Yes, sir, I did.

[fol. 244] Q. What opinion did you form?

A. The same as in the first.

Q. What opinion did you form in the second case?

Mr. Clark: The same objection.

The Court: You may answer.

A. It was from the effect of the result of the rattlesnake venom.

Mr. Williams: You may cross-examine.

Cross-examination.

By Mr. Clark:

Q. Dr. Boehme, are you engaged in general practice, or do you pursue some specialty?

A. Diagnosis generally.

Q. And in the field of diagnosis very great changes have taken place in recent years?

A. Yes, sir—I didn't get that? In the value of what?

Q. The value of diagnosis have undergone great change?

A. Yes, they are changing every hour.

Q. I assume that you are concerned principally with bacterial examinations, and making X-ray examinations?

A. I try to get hold of everything that I can get hold of in making diagnoses.

Q. Have you ever devoted any special study to the study of toxicology?

A. Yes, I did.

[fol. 245] Q. Was that during your student days, or graduate work?

A. Both.

Q. How much time did you spend in the study—may I ask what medical school you attended?

A. Cornell University, Medical College.

Q. And how much of the time of your course there was devoted to the study of toxicology?

A. I not only took the regular course, but I took special examinations with the Doctor there, and later with Dr. Schultz, and I did some work with him.

Q. That leaves my question unanswered. How much did you take, months, years, or what?

A. Months, years or how much time, I cannot valuate it. I was in medical school six or eight hours a month in Mexico.

Q. During the whole course?

A. During the last three years, and thereafter, and I did considerable work with the authorities. Incidentally, my father was in the drug business in New York, and he was a medical examiner——

The Court: When you refer to "medical examiner", you refer to an office similar to our office of Coroner here?

A. Yes.

The Court: You may proceed.

By Mr. Clark:

Q. That was how long ago, Doctor?

A. That concluded in 1921, when I came out here.

Q. Those examinations have been a frequent instance of [fol. 246] your work since then?

A. Yes, I do a lot of examination regarding various poisons, We have lead poisons, and those pass often through my office.

Q. Well, in this field, you have had very little poisoning from snake bites?

A. Only bitten by one, and have seen one bitten up here in a canyon.

Q. Now, there are many species of snakes?

A. There are two great varieties. The Coachilla, that is the rattlesnake, and the copperhead of the Mexican, and the little coil snake there.

Q. And you have several species of moccasins?

A. Yes, we have.

Q. So that you have altogether in North America cases of about 20 different species of snakes?

A. More than that.

[fol. 247] Q. Now, you have other poisonous reptiles outside of snakes, haven't you?

A. Yes, sir.

Q. And what are those?

A. Yes. We have tarantulas.

Q. You have tarantulas and various species of scorpians?

A. Yes, sir.

Q. Now, snakes and spiders and scorpians, they spread their venom widely different, don't they?

A. In a general way they are somewhat similar. They are alkaloidal in quality.

Q. Well, an alkaloidal condition is always present in the snake?

A. Yes, sir.

Q. Well, you have many alkaloidal poisons that are in snakes oftentimes?

A. Yes.

Q. And the alkaloidal poison, affects human beings very much along the same lines as any other, doesn't it?

A. Well, each one has his own particular action.

Q. For instance, is there any very marked difference between the manner in which the venom of rattlesnakes affects a person and we will say the venom of a Upland Moccasin?

A. Not especially.

Q. Is there any marked difference in which the venom in a rattlesnakes affects a person and the manner in which [fol 248] the venom of a gila monster affects a person?

A. Not a great deal.

Q. Is there a great deal of difference between a rattlesnake and the tarantula?

A. No, the tarantula is more irritating. It gives you some cerebral irritation that you don't get from the other.

Q. Well, the alkaloidal are more irritating than the others?

A. Yes, sir.

Q. It is a matter of degree, however?

A. Yes, sir.

Q. Now, is there any marked difference between the fangs of the rattlesnake and the venom of the so called black spider?

A. Locally there is. Sometimes you do not get all these material changes and you don't get the same kind of bite.

Q. You don't get the same kind of puncture because the spider has not the fang, is that it?

A. It is.

Q. Of course, you know with relation to the body you examined, whether before death that person had gastric disturbance or not?

A. No, but the manifestations were not like that.

Q. If you knew that that person had suffered a direct disturbance shortly before death, would you take that into consideration in determining whether there had been a snake bite?

[fol. 249] A. Surely, everything has to be taken into account.

Q. Now, is it true, Doctor, that all the poisonous snakes have heads that are broader than the none poisonous ones?

A. It is not true. The rattlesnake group have a triangular head. Other varieties of snakes may have a different head. Take any gopher, they don't have a wide head.

Q. But the rattlesnake does have, however, a head that is much broader than the harmless gopher snake?

A. That is correct.

Q. Moccasin also has a wide head?

A. Yes, sir, the Moccasin also has a wide head.

Q. And a gila monster likewise has a wide head?

A. Yes, he does, but——

Q. Is it true, Doctor, that the width of those heads is occasioned by the presence of the poison glands?

A. No, it is merely an anatomical difference.

Q. About how much venom—strike that out. About how large were these snakes that you examined?

A. It was four foot long and the largest about five.

Q. And did you make any observation for the purpose of determining how much venom each of these snakes secretes at the time?

A. The particular snakes?

A. Yes.

[fol. 250] A. No, we could not. The snakes had been placed in a very large box through the day, and people bothered them during the day, and there was a considerable venom on the glass, and in the one case the snake was in such a condition that we didn't know how much we got there, and the other snake, one of the fangs was completely broken and the other fang was in poor condition so that I couldn't tell you definitely just what the snake would carry, or could carry.

Q. Well, it is true, if I might use such an expression that your snake has his poison practically inside of his body and manufactures his own poison, doesn't he, Doctor? In other words, he consumes certain foods, a part of which enter into the production of the poison?

A. That is so.

Q. In other words, he doesn't go out and pick out the poison all ready for his use?

A. He is his own manufacturer.

Q. So that the quantity of poison that it may have may depend to some extent at least on the quantity of food that he eats, isn't that true?

A. Well, I will tell you what it depends upon. It depends on the type of food he eats, partly, but whether he was bit a very short time before that or not, the rattlesnake will carry about two hundred and fifty million milligrams in its fangs and some as high as six hundred million.

Q. Suppose we place them into spoonfuls.

[fol. 251] A. More of a dishpan full, I think.

Q. And the fang, and the poison glands lie back of the fang, I take it?

A. Yes sir, they are back of the fangs.

Q. And they are open, and the poison is ejected?

A. Yes, sir, and they are covered with a membrane to protect the venom.

Q. I think the ejection of the poison is rather an automatic process, depending upon the pressure?

A. After a good bite, the two come together like this. A snake does bring its lower jaw down in position——

Q. And then the poison actually ejects itself?

A. Yes, sir.

Q. And have you ever observed, Doctor, how many times a snake bites before the poison is entirely exhausted?

A. No, I have not.

Q. Well, it is true, isn't it, that the supply is limited?

A. Yes, the supply is limited and the snake has to regenerate it.

Q. And then a period of some time is required to replenish it.

A. Some period.

Q. How long a time is required?

A. I do not know the time, personally, from observation, but from 8 hours on.

Q. Up to two weeks, isn't it?

[fol. 252] A. Yes, two weeks sometimes.

Q. Isn't it a fact that snakes exist for a length of time without taking food?

A. That is understood in the hibernating period.

Q. Is that true at other times other than in hibernating period?

A. I understand they do live without at times.

Q. Your rattlesnake doesn't masticate his food like we do.

A. All snakes eat it and then it is carried in the digestive track and there it has an absorption.

Q. And that period of absorption may take a long time?

A. Of course.

Q. Of course, you had no knowledge yourself as to what the condition of these rattlesnakes were during the early part of August of last year?

A. No, I didn't know.

Q. You cannot say during the early days of last August whether these snakes had any poison in their poison sacks?

A. It is seldom——

Q. So all you have to depend on is your guess.

A. I think Mr. Williams asked me, called me up to know if I knew anything about the snakes.

Q. And these examinations that you made were made at the request of Mr. Williams?

A. That is correct.

[fol. 253] Q. And that was for the purpose of making an examination so that you could testify in this case?

A. No, originally, it wasn't anything of the sort.

Q. Pardon me; I think you have answered the questions, Doctor. The call that you had from Mr. Williams was before you had seen this body of which you spoke?

A. Yes, sir.

Q. And arrangements were then made for you to see the body before you saw the snakes, were they not?

A. Yes, that is correct. I didn't know whether I was going to see the snakes.

Q. How long was it after you saw the body that you did see the snakes?

A. It was two days thereafter.

Q. Now, without stating anything that had been said by Mr. Williams, when you saw the body, you knew the purpose for which Mr. Williams wished you to examine it, didn't you?

A. Well, surely, I knew why I was there.

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[fol. 254] Q. Dr. Boehme—is that the way you pronounce it?

A. Anyway you like. I have quit arguing. Boehme is correct.

Q. Thank you. Now, Doctor, the guinea pigs that you say you used, about how much did they weigh?

A. One weighed 502 grams, and the other 408 grams.

Q. That would be how much in pounds and ounces?

A. It would be about two and a half pounds, and the other a little less than that.

Q. Well, we will say that that would be approximately correct?

A. Yes.

Q. The body that you saw was the body of a woman weighing 125 or 130 pounds, wouldn't you say?

[fol. 255] A. That is what I was told. I didn't weigh her, or anything.

Q. Naturally it would take a much larger amount of poison to kill a person of that size than it would to kill a two and a half pound guinea pig, wouldn't it, Doctor?

A. Certainly.

Q. You drew no inference from the death of the guinea pigs that either of those snakes could have inflicted a

wound that would have killed this woman, did you, Doctor?

A. May I have that——

Q. I will reframe that. You used the poison on the guinea pigs solely for the purpose of ascertaining the strength of the venom?

A. Yes, to determine——

The Court: There was one question that was not asked the Doctor by Mr. Williams, at least I don't recall it, as to the amount of the injection into the guinea pigs. I don't think that was given. It might be a factor in your question.

By Mr. Clark:

Q. How much poison did you give each guinea pig?

A. Of the pure virus in the large guinea pig there was approximately 10 drops, 10 minims. With the mixed salt solution, approximately the same amount.

Q. Did you use the pure virus on one guinea pig, and the mixed virus on the other?

A. The virus with the normal salt solution, yes.

[fol. 256] Q. That simply means that a definite quantity of virus was put in what you call a normal salt solution?

A. It was not a definite amount, because we had so much difficulty in getting the virus from both the snakes that as much as I could obtain I used merely as a gross test to determine whether this virus was fatal in its action.

Q. When a snake bites a person the quantity of poison injected into the person depends upon a multiplicity of conditions, doesn't it?

A. Oh, yes.

Q. When the bite is upon a hand, toe or finger, it is not nearly so dangerous as when it is on one of the larger, fleshier parts of the body? That is true, isn't it?

A. That is true.

Q. And the wound that you thought was a snake bite was on the toe, wasn't it?

A. It was on the left great toe.

Q. Would you mind telling us which part of the toe it was on?

A. Assuming this was the toe, the base of the toe here, it started about the middle and came toward what we call the inner aspect of the toe.

Q. Would it be on the part of the toe that would be on the ground when the person was standing up?

A. That is correct.

Q. In your study of snakes, and snake poison, you have [fol. 257] observed with some degree of care the habits of snakes, particularly with regard to their method of ejecting the poison?

A. The method of ejecting the poison?

Q. Yes.

A. Yes.

Q. The venomous snake usually coils himself to strike, does he not?

A. Yes, most of them do.

Q. And the fangs of the rattlesnakes, at least, are set in the upper part of the mouth, and curved?

A. They lie like this. They are attached to a small bone, and when they are ready to strike the muscle pulls the piece of bone forward, and we have the two fangs carried forward. As a general rule there is a slight curve backward in the fang.

Q. And your rattlesnake always keeps his belly to the ground, that is, he never lies on his back, does he?

A. Not that I know of.

Q. So that by reason of those conditions your rattlesnake always strikes downward, and never strikes upward, isn't that true?

A. No, I wouldn't say that. I have seen rattlesnakes in boxes coiled about each other so that it would be quite possible for a snake to strike from any position.

Q. You never did see them strike from any position other [fol. 258] than——

A. I never saw it, but I have seen them crawling all over each other.

Q. When they were crawling over each other they weren't striking, were they?

A. Well, I wouldn't care to put my arm in.

Q. Well, they weren't striking, were they?

The Court: You mean they weren't in the act of striking?

A. No, they weren't in the act of striking.

By Mr. Clark:

Q. I wonder, Doctor, if you could give us a little drawing of this bite that you think was a snake bite?

A. I would be very glad to.
Q. I would be very glad to hand you a paper and pencil.

Mr. Williams: Can't we put it on the black board, so that the jurors can see it?

Mr. Clark: Can you do it on the black board, Doctor?

A. There is not very much to it. I don't know whether I will do the lady's toes justice.
Q. We understand that it is merely illustrative. Your artistic ability, or lack of it, will be no reflection upon your medical ability.
A. This is looking up at the great toe.
Q. We are looking at the bottom of the foot?
A. Yes. The scar ran across from here. The top part was about the middle of the great toe, and then there was [fol. 259] this little thing, the whole business about a quarter of an inch in length.
Q. About a quarter of an inch?
A. Yes.

Mr. Clark: Which drawing, if your Honor please, we offer in evidence as a part of the cross examination of the witness, and as illustrative of his oral testimony.
The Court: Mark it Exhibit A.
Mr. Williams: No objection.
Mr. Clark: If there is no objection I will hand it to the jury for their inspection.
The Court: You may do so.

(Exhibit handed to the jury).

Mr. Clark: In order that there may be no misunderstanding, Doctor, in looking at this picture we are looking at it as though we were standing underneath the foot looking at the bottom?
A. Yes.
Q. Counsel thought that that was not quite clear.
A. Yes.
Q. Doctor, this body was in an advanced state of decomposition when you saw it, was it not?
A. Certain parts were. Some were not. The parts about the face were. The body we didn't examine, but it was remarkable the state of preservation of the extremities on both sides.

[fol. 260] Q. The wound on the toe was very discernible at that time, wasn't it?

A. It was covered by a sort of brownish material, a mold, which Dr. Wagner removed, and the scar was found.

Q. Was there a portion of the skin and flesh which had been so far decomposed that it had to be removed before you could see the scar?

A. No, there is a kind of mold forms upon the body after death, and this mold was removed by Dr. Wagner with a knife, and then the actual skin was there underneath it, with a scar running across it.

A Juror: Your Honor, I believe the way he described that, from looking at it, that the toe is on the wrong side of the foot.

Mr. Clark: I am rather inclined to believe that the juror is right. However, as it is merely for illustrative purposes, it will serve the same thing. I think that is all with this witness.

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[fol. 261] CHARLES H. HOPE, resumes stand.

Cross-examination.

By Mr. Parsons:

Q. Mr. Hope, when this man said to you that he wanted you to obtain some rattlesnakes, so that they could be used to kill a person, and he would pay you for doing this, you immediately set out, within a day or two, to obtain these rattlesnakes, is that right?

A. Yes, sir.

Q. For a consideration, is that right?

A. Yes, sir.

Q. You didn't go and inform the police or authorities that this man had asked you to obtain these rattlesnakes that some person might be killed, did you?

A. I did not.

Q. How old are you?

A. 37 years old.

Q. And you have known Mr. James here for some six or seven years, have you?

A. Right.

Q. And during that time, until recent events, at least, you have been on fairly friendly terms, have you?

A. Yes.

Q. And you went to his place of business here in the City of Los Angeles, did you?

A. I have.

[fol. 262] Q. And you were a patron of his, is that right?

A. Right.

Q. And he acted as your barber, is that right?

A. Yes, sir.

Q. And how frequently, prior to this occurrence, would you see Mr. James?

A. Well, that would be hard to say. It would vary. I would say once every two weeks, when I was in town. When I was in business in Pomona, it would be every two or three months.

Q. That is right, you were in business in Pomona?

A. Yes.

Q. What business were you in there?

Mr. Williams: Object to that as immaterial.

The Court: I think it is immaterial.

Mr. Parsons:

Q. What has been your business for the last year prior to this occurrence?

A. Building maintenance.

Q. And you were following that right along, were you, up until June, 1935?

A. Yes, sir.

Q. And prior to June, 1935, had you ever received any money from Mr. James?

A. I had borrowed money from him a time or two, and repaid it.

Q. Your relations were such that if you——

[fol. 263] A. I, however, gave security for this money.

Q. You gave security?

A. Yes.

Q. But you did negotiate a loan with him, is that right?

A. Yes, sir.

Q. How much was that?

A. I think it was $5.00.

Q. And that transaction was terminated all right, was it?

A. Yes.

Q. Now, you said that you met Mr. James in June, is that right, of 1935?

A. I saw him in June.

Q. And that is when you first had this conversation?

A. It is.

Q. Pertaining to this matter?

A. Yes, sir.

Q. Now, this conversation was held outside of his barber shop, is that right?

A. Part of it.

Q. Well, was the conversation that you related here held outside of the barber shop?

A. Part of it. I also said part of it was related in the barber shop.

Q. You also said that?

A. Yes, sir.

Q. Now, you testified here yesterday, page 137, did you [fol. 264] not, in substance: "He went outside of his barber shop"?

A. I did.

Q. Now, what portion of the conversation was held in the barber shop, and what portion outside?

A. The portion held in the barber shop was to learn if I would get the snakes, and if I knew anything about them.

Q. What did he say to you inside the barber shop?

A. "Do you know anything about rattlesnakes?"

Q. Wanted to know if you knew anything about rattlesnakes?

A. Yes.

Q. What else was said in the barber shop?

A. If I could obtain some for him.

Q. What else was said?

A. That is all that was said that day.

Q. That day?

A. Yes, sir. I told him I would find out if I could get some.

Q. Who was there at that time?

A. I am unable to state all the people that were there. The two barbers were there, if I remember correctly, and a patron or two. I think possibly his niece was there; I wouldn't say for certain.

Q. At that time did he go outside of the barber shop with you?

A. Not on that day, no sir.

[fol. 265] Q. Now, did you have a subsequent conversation with him?

A. Yes, sir, the next time I was in the barber shop.

Q. How long after that?

A. It was a very few days.

Q. And what was said then?

A. He wanted to know if I found out anything about snakes. I told him "Yes", I could get him some.

Q. And that was some two or three days later, is that right?

A. I would say so, yes.

Q. Was that inside of the barber shop, or outside?

A. That was inside of the barber shop.

Q. Do you know who was there present?

A. No, sir, I don't.

Q. And where were you working at that time?

A. Where was I working at that time?

Q. Yes.

A. I was working at the Corporation Building.

Q. The Corporation Building; and where were you living?

A. I was living on Hope Street.

Q. Whereabouts on Hope Street?

A. I don't know the name of the street.

Q. Can you give us the block you were in?

A. It was between 9th and 10th, on Hope.

Q. In one of the apartment houses there?

A. Yes.

[fol. 266] Q. You don't know the name of the place?

A. No.

Q. What did he tell you that he wanted these rattlesnakes for, if anything?

A. He told me that he had a friend that his wife had been annoying him, and keeping him broke, and he wanted these snakes to kill her, which I didn't believe.

Mr. Parsons: I move to strike out the latter part of it. Just state the conversation, please, sir. What was the conversation? What did he say to you?

A. If I would get these—now, wait a minute; you have got me all mixed up.

Q. What was that you just said?

A. I said you had me a little confused there, a little mixed up.

. . . . . .

Q. When you had this conversation with reference to these snakes, you now say it was on the second conversation that he said the object of your purchasing the snakes, is that right?

A. I think that is correct, yes.

[fol. 267] Q. Now, what did he say to you with reference to the object of procuring these snakes?

A. To procure them for a friend of his who was going to kill his wife.

Mr. Parsons: Now, I direct your attention to your testimony given on June 24th, in this Court, page 137. I will ask you to read lines 22 to 25, to yourself.

A. No, that is not what I said.

Q. The witness has said "No, that is not what I said." Just read it, and then don't say anything until I ask you a question, please. Have you now read that?

A. Yes.

Q. I will ask you if here in this very courtroom you didn't testify as follows: "A—He went outside of his barber shop and said he had a friend of his wife's, that had been annoying him quite a bit, and he was going to kill him and wanted to get some rattlesnakes, and laughed about it."

A. That is not, I believe, what I said.

Q. So that the reporter was in error in taking this down in this manner, is that right?

Mr. Williams: Just a moment. That is argumentative.

A. There is an expression of men and wives in there [fol. 268] that was perhaps misunderstood.

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[fol. 269] Q. Now, you testified before the Grand Jury, did you not?

A. I did.

Q. Now, I am directing your attention to page 2 of your testimony given there, and I will ask you to read lines 20, 21 and 22, just to yourself, please, sir. Just lines 20, 21 and 22, and when you have finished you will let me know.

A. Yes.

[fol. 270] Q. And now, before the Grand Jury, I will ask you if you didn't state this, this was the conversation, "I

have a friend who has a wife that is keeping him broke and he wants to kill her. He is going to kill her with a rattlesnake." You so testified before the Grand Jury, did you not?

A. That is correct.

Q. Now, you testified here that Mr. James said to you, "If you will get me some rattlesnakes I will give you $100.00". Is that right?

A. Yes, sir.

Q. That was the conversation?

A. I was to be paid $100.00.

Q. Now, you testified here, page 137 of the reporters' transcript in this very court, I will ask you to read line 26 to yourself, starting with the words, "He said". Have you finished reading that?

A. Yes, sir.

Q. And then, read line 1 on page 138.

A. Right.

Q. Now, I will ask you if you didn't testify in this courtroom, "He said, 'If you will get me some rattlesnakes I will give you $100.00.' "?

A. Correct.

Q. And now, upon that subject you testified before the Grand Jury referring to your conversation alleged held with Mr. James, page 2, Mr. Williams, of the Grand Jury transcript, line 25, we will start in with the words, "He [fol. 271] said". Will you read through line 25 and through line 26?

A. Yes, I have read it.

Q. Now, before the Grand Jury, in response to a question, you said this, did you not? "He said this man will give you $100.00 to buy these rattlesnakes". And now, did you so testify before the Grand Jury?

A. I believe I did.

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[fol. 272] Mr. Parsons:

Q. Now, Mr. Hope, after you had had this conversation you set out to obtain these snakes, is that right?

A. I did.

Q. And where did you go first?

A. To Long Beach.

Q. To Long Beach, and who did you see there?

A. Mr. Kirby.

Q. And what did you do, obtain a snake or snakes?

A. Obtained three snakes.

Q. What did you do with them?

A. Kept them in my apartment for a couple of days until I got a chance to see Mr. James. He gave me the money for them and I delivered them to his house in La Canada.

Q. When did you next see James after that?

A. Oh, the next time I saw him to actually see him, if that is the question?

Q. Yes. Where did you see him?

A. I saw him in his barber shop, I suppose about two weeks afterward.

Q. Now, when you brought these snakes back you say you took them out to Mr. James' house?

A. Yes.

[fol. 273] Q. La Canada?

A. Yes.

Q. What did you do with them?

A. Set them in the garage.

Q. Was Mr. James there when you delivered them.

A. He was.

Q. Do you recall what day it was?

A. No, sir, I don't.

Q. Can you give us some approximation?

A. Oh, it was around the 5th or 6th of July. I was getting ready to move and had to get them out of my apartment.

Q. And was there any person there when you brought the snakes there other than Mr. James, that you saw?

A. No, sir.

Q. Was it night time or day time?

A. It was in the evening.

Q. And in what kind of a receptacle did you have the snakes?

A. In a small box that had a glass in front of it.

Q. A small box. How large was the box?

A. Well, I couldn't say exactly. Perhaps Mr. Kirby there could tell you. He had the box.

Q. Well, what is your best judgment about it?

A. I would say the box was about that long and about that deep.

[fol. 274] Q. About 18 inches long and about 10 or 1[illegible] inches high, is that right?

A. That is right.

Q. And how wide?

A. About 7 or 8 inches wide.

Q. And had a glass top on it?

A. No, sir, it had a glass side on it.

Q. How did you get the snakes in or out?

A. Mr. Kirby put them in.

Q. How did he put them in? What did he open up to get them into the box?

A. He opened up a large pen I guess they call it. I don't know what they call it.

Q. Referring to the box, what portion of the box did he use to put the snakes inside of the box?

A. He put them inside of the box and shut the lid.

Q. Then shut the lid?

A. Yes, sir.

Q. How big was the lid?

A. It covered the box.

Q. The whole side?

A. Covered the top of the box.

Q. And that is the method of conveyance that you used to deliver them to Mr. James' residence?

A. Yes, sir.

Q. And it was some two weeks or so after that before you [fols. 275-276] saw Mr. James again, is that right?

A. Yes, sir.

Q. Now, you stated that you said to Mr. James that you had to go to the desert to get these snakes and that he told you if you had to go out on the desert to get him snakes, that he would defray the expenses. Did he tell you that?

A. He said that he would see that I had the money to defray all expenses, yes, sir.

Q. Now, when you testified before the Grand Jury, did you say anything about Mr. James telling you that if you had to go out on the desert to get these snakes he would defray all of the expenses?

Mr. Williams: Just a minute; that is objected to on the ground there is no proper foundation laid.

The Court: Sustained.

Mr. Parsons: Have you read the testimony given by yourself before the Grand Jury?

A. Part of it.

* * * * * * *

[fol. 277] Q. Now, after you had met this man a second time, did you meet him again?

A. What man?

Q. Mr. James?

A. Yes, sir. I moved out to his house.

Q. Moved out to his house and moved in, is that right?

A. Yes, sir, at his suggestion.

[fol. 278] Q. Well, you went out there willingly, didn't you?

A. Surely.

Q. And he told you he wanted you to do a little work out there, is that right?

A. Yes, but the work didn't materialize to be very much work done.

Q. Did you do any work out there?

A. I fixed one chicken coop, tightened a little wire, and raked around a clothes line, I believe. The rest of the time he brought me to town every morning with him.

Q. But you stayed out there at the home, did you not?

A. At night time.

Q. How long did you stay there?

A. About four or five days.

Q. Was Mrs. James there at all during that time?

A. Two days.

Q. Two days she was there. And then she left to make a little trip, is that right?

A. Right.

Q. And when was it that you left there?

A. I left there the day after Mrs. James left, I am sure.

Q. And do you recall when it was she left?

A. No, I don't know the exact day. I know there was a convention. She went to a convention in Long Beach, so I was told. Mr. James' sister was there at the time and I was there one morning with Mr. James and his sister. I left that day.

[fol. 279] Q. Which sister was that?

A. Mrs. Murphy.

Q. Mrs. Murphy?

A. I think that is her name.

Mr. Parsons: Stand up, Mrs. Murphy. She just stepped out. In any event, who was there besides Mrs. Murphy, Mr. James and Mrs. James during your stay?

A. One Sunday morning Lois was there.

Q. That is the niece?

A. Yes, sir.

[fol. 280] Q. She came over, and you folks all had breakfast together, is that right?

A. I wasn't there when she arrived.

Q. Now, during the time that you were out there you stayed at the house, and you had some of your meals there?

A. I had breakfast there.

Q. And you did some work out in the yard, is that right?

A. A little work.

Q. And then when did you see Mr. James again?

A. I would say about the middle of July.

Q. And where was that that you met him?

A. In his barber shop.

Q. And did you have any conversation with him then?

A. Yes, he told me the man was dissatisfied with the snakes, that he and his family had been to Ocean Park where there was a snake pit conducted, to go down there and see what I could find out about the snakes, or better yet, what was I doing that day. I told him nothing. He said, "Well, I will go down with you", and we went to Ocean Park.

Q. And what time did you leave?

A. Well, I don't know.

Q. Can't you tell us about what time of day it was?

A. No, I can't.

Q. Was it morning or afternoon?

A. It was in the afternoon, I would surmise, because I don't believe they are open in the morning, because I was [fol. 281] down there the next morning, and they weren't open.

Q. And you left for Mr. James' barber shop, is that right?

A. That is correct.

Q. Did you see Mr. James, and have this conversation with him in the barber shop?

A. I had part of it in the barber shop.

Q. And who was there, if anybody, besides yourself and Mr. James?

A. That I couldn't tell you.

Q. And were there any of the barbers there?

A. Yes.

Q. And some patrons?

A. That I don't know.

Q. How long were you in the shop before you and Mr. James set out on this trip?

A. Oh, long enough to get a haircut; I would say 15 or 20 minutes.

Q. And did you and Mr. James walk out together?

A. I don't know whether we did, or not?

Q. Did you meet after you left the shop?

A. We met, or walked out together; I don't know which.

Q. Where did you meet?

A. I don't know.

Q. Well, where did you go after you left the shop?

A. We went to Ocean Park in his automobile.

Q. Where did you get the car?

[fol. 282] A. At the Savoy Auto Park, 8th and Grand Avenue.

Q. Did you park the car in Ocear Park in a public park, or upon the street?

A. We parked it in a parking lot.

Q. And do you know where that parking lot is?

A. I think I do.

Q. Where?

A. I could take you to it. I don't know the streets in Ocean Park.

Q. You don't. Now, did you and Mr. James then go up to some snake pit?

A. We did.

Q. How long were you there?

A. I should say we were there about an hour and a half, or two hours.

Q. Did you have any conversation with anybody?

A. Well, he had most of the conversation.

Q. Well, what did he say?

A. I couldn't tell you all that he said. One thing I heard him say was he said he bet the man $20.00 there wasn't a poisonous snake in the pit.

Q. And that portion of it you heard, is that right?

A. Yes, sir, that is right.

Q. Was it along toward evening when you left?

A. I don't recall what time of the day it was. I would say in the late afternoon, middle of the afternoon sometime.

[fol. 283] Q. Four or five o'clock.

A. Before five o'clock, yes, because I was back in Los Angeles.

Q. And when you and Mr. James returned to Los Angeles, did you both return to the shop, or did he let you out some place?

A. I don't recall whether I got out downtown at that time, or whether he was going home. If he was going home. he drove me out Vermont Avenue.

Q. Now, who did you see down there at the snake pit?

A. The man that owned it.

Q. Do you know his name?

A. No, sir.

Q. Is he here in court?

A. He is, or was. I don't know whether he is now, or not.

Q. Do you know what they call him?

A. No, sir.

Q. Did you ever hear him addressed down there by any name?

A. I think they called hi. Mike.

A. And what did you do after that?

A. What do you mean, the same day?

Q. Well, you left Mr. James that evening, I take it, and then you didn't see him any more that day, is that right?

A. That is right.

Q. When did you again see Mr. James?

A. The next day.

[fol. 284] Q. Where did you meet him?

A. I met him at the barber shop, and he gave me a note to get his car.

Q. You went down to the barber shop and procured a note from Mr. James, and went over and procured his automobile at the park, is that it?

A. That is right.

Q. And then where did you go?

A. I went to Ocean Park.

Q. What did you do down there?

A. I left one snake, and got another one.

Q. You left one snake and procured another one, is that right?

A. Yes, that is right, the one that Mr. James had designated the day before that he wanted.

Q. That is the one that you picked out, is that right?

A. As near as I can remember, yes. I asked this gentleman if this was the snake they were talking about, and he said "Yes", it was.

Q. How did you bring the snake back? In what kind of a receptacle?

A. In a wooden box, with a glass top.

Q. And you at that time didn't relate to any authorities that you were procuring a snake for a man who had stated that it was to be used for the purpose of killing somebody, did you?

[fol. 285] A. I think I answered that question a while ago.

Q. I mean at this time, if I may have the answer, without getting into any argument. If I may, if your Honor please, have my answer.

A. There was nothing said about killing anybody with this snake.

* * * * * * *

Mr. Parsons: Now, at no time during your going to these various places to procure snakes did you ever relate any of the circumstances to any official or officer, did you?

A. No, sir. It is not against the law to procure a rattlesnake; I found that out.

* * * * * * *

Mr. Parsons:

Q. At any time during the time that you had these conversations with Mr. James about these snakes, at any time were you told that the snakes were for the purpose of being [fol. 286] used for any other purpose than to kill a human being?

A. Yes, sir.

Q. And what were you told?

A. I was told at Ocean Park to tell the man that I had lost money in a poker game, and I was going to regain it by proving that these snakes were poisonous.

Q. And that was what Mr. James had told you to tell the snake man, is that right?

A. Absolutely; yes sir.

Q. And subsequently was some other story told to you?

A. It was, two of them.

Q. And when after you returned from Ocean Park with the snake which had been indicated to you, as you say, when did you next see Mr. James after that?

A. You mean after I had delivered the snake to him?

Q. Well, when did you deliver the snake?

A. That evening.

Q. Where did you deliver it?

A. In his barber shop.

Q. He got in the car and went on home, and you went on home with him, is that right?

A. I don't know where he went.

Q. Where did you leave him?

A. I gave him the snake.

Q. At the barber shop?

A. Yes.

[fol. 287] Q. He didn't drive you to Beverly and Vermont?

A. No, not that time.

Q. After you delivered that snake to him at the barber shop, when did you next see him again?

A. I used to go in there for a haircut and a shave every couple of weeks.

Q. Now now, had he given you any money during this time?

A. He gave me $100.00 the night I delivered him this snake from Ocean Park, and he gave me $20.00 when I went to Long Beach to get the snake.

Q. Now, these snakes that you purchased, you paid about $1.50 or $2.00 for them, didn't you?

A. It varied. The first I paid $5.00 for them.

Q. What did you pay for all of these snakes?

A. About $12.00.

Q. So that up to that time you were about $108.00 ahead of the game, is that right?

A. No, I wouldn't say that. You have to buy gasoline, and feed yourself, and various other sundry items.

Q. Now, you were using his automobile, were you not?

A. That is true. I also bought the gasoline and oil for it.

Q. Did he ever give you any money for gasoline?

A. Not additional to that.

Q. He never at any time gave you any money for gasoline?

A. No, sir.

[fol. 288] Q. During these trips and excursions?

A. I imagine I was supposed to take it out of this money that he gave me.

Q. Now, after that occurrence when did you next see Mr. James again?

A. I went in there every so often to get a haircut and a shave. I don't remember the exact date that I saw him the next time.

Q. Did you see him on several occasions?

A. Several occasions, yes.

Q. When did you, if ever at all, discuss snakes with him again?

A. On Saturday, the 3rd day of August.

Q. Saturday, the 3rd of August, and where was that that you had that conversation?

A. That was in his barber shop.

Q. And what was said there between you?

A. I don't know whether it was in his barber shop; I don't remember whether it was in his barber shop, or where it was, or whether he went outside, but that was the day he told me to go over to Snake Joe's. Pardon me; may I change that?

Q. Yes, if you wish to.

A. I saw him Friday, and he drove to Pasadena with me, and waited in the car while I went over to inquire for this [fol. 289] man, and he wasn't home. I was told that I could see him the next afternoon, which would be Saturday and we came back to Los Angeles.

Q. And what time did you return here?

A. I don't know; it was about—I would say around 4 o'clock.

Q. Well now, when you met Mr. James and started to Pasadena, you met him at the barber shop?

A. Yes, at his barber shop.

Q. Did you go in the shop?

A. Well, I suppose I did. I generally did.

Q. Well, do you recall who was there on that particular occasion?

A. No.

Q. And then you and he left and obtained the automobile and went to Pasadena, is that right?

A. That is right.

Q. In his car?

A. In his car.

Q. And did you get back before dark?

A. Yes, sir.

Q. Did you go back to the shop?

A. I don't know where he went.

Q. Where did he leave you at?
A. He left me on Vermont Avenue.
Q. Left you on Vermont Avenue?
A. He came into Pasadena around—oh, through Glendale.
[fol. 290] Q. Did you acquire a snake on that occasion?
A. No, sir.
Q. You didn't make any purchases?
A. No, sir.
Q. Neither one of you?
A. No, sir.
Q. And when did you next see him?
A. The next day.
Q. You saw him the next day?
A. Yes, sir.
Q. Where did you see him?
A. In the barber shop. He gave me the key to his car to go to Pasadena to get the snakes that he was talking about before.
Q. Did he give you any money?
A. Yes, $5.00.
Q. And did you go to Pasadena?
A. Yes, sir.
Q. Did you buy a snake?
A. I bought two snakes.
Q. And did he say anything about the snakes?
A. He certainly did.
Q. What did he say?
A. He said, "I want some real fighters. These snakes you have got in here are not so good." He said, "Tell this man over here they are going to fight chickens and dogs."
[fol. 291] Q. And did you believe that the purpose of securing these snakes had now switched from killing a human being to the purpose of fighting dogs or chickens?
A. That sounded the most logical thing to me.
Q. It sounded the most logical thing to you?
A. Yes, sir.
Q. And did you have any discussion with Mr. James further upon that point?
A. What point?
Q. Upon the question of the object of procuring those snakes?
A. Please state your question more clearly.

Mr. Parson: Strike it out.

Q. Did Mr. James say anything to you about the purpose for which you were to obtain these snakes?

A. Not for what I was to obtain them for, no sir.

Q. As a matter of fact, the only time that he ever told you what the snakes were to be obtained for was in the first instance, when he told you that the snakes were to be bought for the purpose of killing a fellow human being, isn't that right?

A. That was supposedly to have been told to me, and to him.

Q. But that was the purpose for which you originally set out, isn't that right?

A. Yes.

Q. Then, later, on two separate occasions he merely told [fol. 292-309] you to tell people what you were obtaining them for?

A. The first time I was to tell the party that I got them from that they were for experimental purposes.

Q. Now, after you returned from Pasadena, did you say you saw him the next day, is that right?

A. Yes.

Q. And about what time was it when you saw him?

A. About 12:30.

Q. And that day was what?

A. Sunday.

Q. Sunday?

A. Yes, sir.

Q. And where did you see him then?

A. At his home at La Canada.

Q. You went out there, did you?

A. Yes, sir.

Q. And where did you find Mr. James?

A. Mr. James came out and met me in the driveway.

Q. And how long were you there?

A. I was there for almost—between 12:30—well, about 1:15 or 1:20 or possibly 1:30.

. . . . . .

[fol. 310] By Mr. Williams:

Q. Mr. Hope, I direct your attention to the transcript of the testimony of this case, Page 151, the answer begin-

ning on Line 8, and ending on Line 13, and ask you to read that entire answer, and when you have finished reading it, just let me know that you have finished.

A. I have finished.

Q. Now, Mr. Hope, you have in mind that this particular answer has to do with the time when you and Mr. James, according to your testimony, were at Ocean Park at the snake pit?

A. I do, yes, sir.

Q. Now, is it correct that at that time you said: "I was asking him questions—I didn't hear a whole lot of it, but I did hear from the man that owned the pit, 'I will bet you $20.00 there isn't a poisonous snake in the city.'"

A. No, sir.

Q. What did happen at that time?

A. I was standing somewhere near Mr. James, and he was asking the man that owned the snake pit in Ocean Park questions. He told me to move around, but before he did, I heard Mr. James say to the man in the pit that Mr. James would bet him $20.00 that the owner didn't [fol. 311] have a poisonous snake in the pit.

Mr. Williams: That is all.

Cross-examination (Continued).

By Mr. Parsons:

Q. Now, at that time you say that Mr. James told you to move around, Mr. Hope?

A. Yes, sir.

Q. Where did he tell you to go to?

A. On the other side of the pit.

Q. And what else, if anything did he say at that time, with reference to your movement?

A. Nothing at that time—oh, yes, he did too. He said he didn't want people to think that we were together; he didn't want this man to think we were together.

Q. Now, during the time that you were at this pit were you together any considerable period of time?

A. No, sir, not any considerable period of time.

Q. What was the longest period of time that you and Mr. James stood by one another?

A. Not over three or four minutes.

Q. Not over three or four minutes?

A. I would say that was it.

Q. Did you walk in together?

A. No, sir.

Q. Walked in separately, is that right?

[fol. 312] A. Yes, sir.

Q. And did you both go to the same side of the pit?

A. The pit, as I remember it, is circular.

Q. And there is a walkway completely around it, is there not?

A. Yes, there is.

Q. So that persons may walk around and look down in the enclosure where the snakes and the operator in charge are, is that right?

A. That is right.

Q. And you and Mr. James didn't go around the same way, did you?

A. No, sir.

Q. You went in opposite directions, is that right?

A. Yes, sir.

Q. And at any time, for more than a moment or so, did you have any conversation with one another?

A. Not to my recollection at the present time, no, sir.

Q. So that during the time that afternoon that you were there, at the most you were not together more than three or four minutes?

A. As I recollect it, yes, sir.

Q. And during the time that you were there were there other persons in there watching the exhibit?

A. I believe there were, yes, sir.

Q. And were there many or few persons?

[fol. 313] A. I think there were few.

Q. But during all of the time that you were in there there were persons coming in and out, were there not, to observe the exhibit?

A. I wouldn't say that they were going in and out that fast, no, sir. I don't think there were more than four or five people in there all the time that I was in there.

Q. Did they remain there throughout the time that you were there?

A. I don't know.

Q. Do you recall that at any time that you and Mr. James were the only persons in the pit, other than the operator?

A. I don't recall that.

A. And was Mr. Allman in the pit at all times?

A. I believe he was, yes, sir.

Q. Was he alone in the pit with the snakes?

A. I think he was.

Q. Did he leave the pit at any time while you were there?

A. Not that day, I don't believe.

Q. On this particular date when you tell us that Mr. James was with you, that is the day to which my questions are directed.

A. Yes, sir.

Q. How long were you there?

A. I believe we were there a matter of an hour or more.

Q. And were persons asking the operator questions?

[fol. 314] A. I imagine they were, yes. Everybody seems to ask questions that goes in there.

Q. Well, it is your best recollection now, is it not, that the people were asking the operator questions about the snakes and their habits and conduct, is that right?

A. As I remember it, any one that asks him a question he will direct his attention to that person until they have finished with whatever the subject might be, and then he moves on to the next person and gives them the same demonstration.

Q. And as you have now related it, that was taking place during that afternoon, is that right?

A. Yes, sir.

Q. And during the course of these conversations the attention of the snake pit operator would be directed to various snakes, would it not, by the various persons inquiring there?

A. Yes, sir.

Q. And he would bend down, and with his hands, or with a stick, pick up the snakes, and display their various movements?

A. I didn't see him pick up any snakes.

Q. Did you see him observe the snakes?

A. Yes, sir.

Q. For a considerable period of time while he was explaining the conduct of the snakes to various people there, [fol. 315] the operator was observing the snakes, was he not?

A. Yes, he was.

Q. And every moment or two he put his eyes on them, did he not?

A. Yes, sir.

Q. And observed their movements?

A. Yes, sir.

Q. And were the snakes in close proximity to the operator?

A. I don't recall.

Q. How far away was he from the snakes?

A. I don't know. The pit was full of snakes. Sometimes he would be standing right in front of one.

Q. And he was in and about the snakes, was he not?

A. That is right.

Q. And practically at all times keeping his attention on the snakes? For a moment or so he would direct his attention to a visitor, and then back on the snakes again, is that about the way it occurred?

A. I would say he devoted more time to the customers than he did to the snakes.

Q. Would he illustrate by pointing to the snakes, in illustrating his discussions with the persons?

A. He did, and he would have the snake strike at him.

Q. Yes, he would show how the snake strikes, and would point out the various colors, and indicate whether it was a [fol. 316] Western black diamond back, or Western Pacific, or Red Rattler, or things of that sort, would he not?

A. Well, I didn't hear much of it, myself.

Q. But in substance that was along the line that this operator was illustrating his exhibit there, was it not, telling the persons the type of snakes that were there, and pointing out their individual characteristics?

A. I would imagine so, yes, sir.

Q. Now, you say you imagine so. Is that your recollection of what you did hear there, anyway, in substance?

A. I said I didn't hear much of this conversation.

Q. Well, were you observing the exhibit?

A. I was on the far side. I wasn't where the gentleman was giving his demonstration.

Q. Mr. Hope, we have had some little difficulty here getting this record right, and if you will keep your voice up then I think we will get it as it is related.

A. Yes, sir.

Q. Now, this pit is how big? This snake pit is how big?

A. It is quite large. I don't have any idea how large it is.

Q. Well, can you give us some idea of the diameter by pointing out something here in court?

A. Well, it is as large, if not larger, than the enclosure in here.

Q. Is it safe to say that the width of the pit is about [fol. 317] the distance from yourself to myself?

A. Easily that, yes, sir, if not wider.

Q. And how deep was it?

A. About six or seven feet.

[fol. 318] By Mr. Parsons:

Q. So that the person, the operator, was some three or four feet below the person who stood around the circle of the pit, was he not?

A. Yes, sir.

Q. And above the top of the pit and to the top of the rail—there is a railing along the top of the pit?

A. I believe there is.

Q. Upon which passers by may rest their elbows and lean over and look in the pit, is that right?

A. Yes, sir.

Q. And between the top wiring of the pit and this wiring there is a covering, is there not?

A. I don't recall whether there is or not.

Q. Now, did you and Mr. James leave together?

A. No, sir.

Q. You left separately?

A. Yes, sir.

Q. Now, directing your attention to another subject, you stated that you saw Mr. James on August 3rd, is that right?

A. Yes, sir.

Q. What day of the week was that?

A. On Saturday.

Q. And you saw Mr. James about 5:30 of that day, is that correct?

A. I saw him before that, sir.

Q. What time did you see him before that?

[fol. 319] A. I saw him about 1 o'clock.

Q. And then you later saw him that afternoon about 5:30?

A. I wouldn't be positive, somewhere between 5:30 and 6:00 o'clock.

Q. Well, at that time you met him in front of the shop, is that correct?

A. Yes, sir, by prearrangement by telephone.

Q. And did he come out and get in the car with you?

A. Not the first time. I had to drive around the block a time or two.

Q. Did you drive around the block more than a couple of times?

A. I don't think so, no.

Q. And on the second time you passed the shop, he climbed in the car with you, is that right?

A. Yes, sir.

Q. And then you and he went in which direction?

A. West.

Q. And where did you leave the car finally, if at all?

A. I left the car at Wilshire and Vermont and went in the drug store.

Q. At Wilshire and Vermont?

A. Vermont and Wilshire. We were on Vermont.

Q. And you were in the drug store a moment or two, were you?

[fol. 320] A. About ten minutes, I would say.

Q. And from there, where did you go?

A. I went north on Vermont Avenue to approximately Beverly,—or right at Beverly.

Q. And is that where you left Mr. James?

A. Yes, sir, that is where I left Mr. James.

Q. And at or about the time that you left the car, you had a conversation with Mr. James, is that right?

A. That is right.

Q. And that is the time when he told you that it was he who was the killer, is that right?

A. That is right.

Q. And that his wife had some insurance and that he intended to kill her for it, is that right?

A. That is right.

Q. So that it was about 6 o'clock when you left Mr. James, is that right?

A. It was later than 6 o'clock.

Q. How much later?

A. Well, I wouldn't be able to say, 35 or 40 minutes or maybe more.

Q. Possibly then half past six, is that right?

A. I would say between half past six and seven o'clock.

Q. And how did you fix the time as between 5:30 and 6:00 that you picked up Mr. James at the barber shop?

A. Why, my wife and I went to dinner after I returned [fol. 321] home. It was a short distance and my car was across the street and I went over and got it.

Q. And it was about 6:30 when you and she went to dinner?

A. No sir, it was about 8 o'clock.

Q. It was about 8 o'clock?

A. Yes, sir.

Q. And did you spend some time with your wife in between the time you left Mr. James——

A. Yes sir, we went to a show.

The Court: Let me interrupt for a minute.

(Calendar matters.)

The Court: You may proceed in the case on trial.

By Mr. Parsons:

Q. Now, after you left Mr. James that evening, at Beverly and Vermont, when did you next see Mr. James?

A. Between 12:30 and—between 12:00 and 12:30 on the following day.

Q. And that was at the James' home in La Canada?

A. Correct, yes sir.

Q. And you went out there, did you?

A. Yes, sir.

Q. And then you spent some time there at the James' home, did you not?

A. I was there about an hour, between an hour and a half and an hour and fifteen minutes.

[fol. 322] Q. And about 10 minutes after—You remained in the garage some 10 minutes or so after you arrived and talked with Mr. James, is that right?

A. No, Mr. James came out to meet me.

Q. And you spent about some 10 minutes there in the garage, is that true?

A. That is right.

Q. And during that time you had some conversation did you?

A. Yes, sir.

Q. With reference to what was to be done, is that right?

A. The removal of the snakes.

Q. And at that time, did you observe a box there?

A. I observed three boxes.

Q. And were there snakes in the box or boxes?

A. Yes, sir.

Q. And at that time did you pick up a box and take it in the house?

A. Not at that time, no sir.

Q. When did you pick it up, pick up a box and take it in the house?

A. About 20 minutes later.

Q. So that along 1:30 was when you picked up the box and took it in the house, was it?

A. No, sir.

Q. What time was it?

[fol. 323] A. Between quarter of 1:00 and 1:00 o'clock.

Q. Between quarter of 1:00 and 1:00 o'clock?

A. Yes, sir.

Q. And this box, which you picked up and took in the house, did it have a snake in it?

A. Yes, sir.

Q. Did it have more than one?

A. No.

Q. Describe now that box. What was its size?

A. It was a wooden, glass top box.

Q. About how long?

A. Well, I do not know—it was about this long.

Mr. Williams: Indicating about two feet.

By Mr. Parsons:

Q. About two feet, would you say?

A. Yes, about two feet.

Q. And about how wide was the box?

A. The box was 7 or 8 inches wide, I should say.

Q. Now, here is a ruler, Mr. Hope, and I am holding the 12 mark there, indicating a foot. It may be a little bit easier to measure it that way.

A. Yes, sir.

Q. Now, I will mark that—you watch me in front of you—two feet?

A. Yes, sir.

Q. Now, is that about the correct length of the box?

A. Yes, sir.

[fol. 324] Q. Will you indicate about how wide the box was?

A. The box was about as wide as this banister.

Q. Which happens to be 8 3/4 inches, is that right?
A. Yes, sir.
Q. Now, you look at the ruler, and check me.
A. Yes, sir.
Q. That is correct?
A. Yes, sir.
Q. And how high was the box?
A. I would say that the box was 10 inches high, between 10 and 11 inches high.
Q. Now, is that about the height of the box?
A. As I remember, yes.
Q. And on one side of the box it was glass, is that right?
A. That is right, yes, sir.
Q. And did you—strike that. As you went in the house Mr. James followed along behind you, did he?
A. He held the screen door to the back porch.
Q. And you carried the box in?
A. I did.
Q. With the reptile in?
A. I did.
Q. And when you went in the house, where did you go? What portion of the house?
A. When I entered the house, I found it in the kitchen. [fol. 325] He preceded me in there. I stopped on the porch, and he preceded me into the kitchen. He then went directly to the breakfast room.
Q. Mr. Hope, I will hand you the pointer, and I will stand out of view. Now, if you will indicate the course that was taken by you as you brought the box into the house, please. Maybe I can help you. The north is the top, the east is on the left-hand side, and the south is the bottom, and the west is on the right-hand portion of the plat. Now, this indicated on the east side is the driveway. That is the area in gray. The dining room is here, the living room indicated here, the sun room indicated here, and the bedroom indicated here, and this is the bedroom and a bathroom, and here is the kitchen and the sink and the stove. Now, immediately to the west of the house is indicated the fish pond. Now, to the north of the house there is indicated a table. There are walks indicated there in gray. Does that help you?
A. Yes.
Q. Now, indicate where you entered the house, please?
A. This indicates the door?

Q. Yes.

A. I came through here. He held this door open. That is the door to the back porch. I stopped here by the ice box.

Mr. Parsons: Now, I will take the liberty, if I may, your [fol. 326] Honor, in marking this "H-1", indicating the door entered by Mr. Hope.

Q. Now, what course did you pursue from this "H-1"?

A. I came directly right to there.

The Court: Now, just a minute. As I understand, prior to that you stopped for a moment by the ice box?

A. Yes, and Mr. James preceded me in.

The Court: That was indicated there. It was a point that was southwest, directly southwest.

[fol. 327] Mr. Parsons: If you will indicate where you stopped. You stopped at that point there?

A. Yes.

Q. I will mark it with an "X", "H-2". Now, did you hesitate there for a moment?

A. Yes, sir, I did.

Q. And from there where did you go?

A. From here I came directly down here, (indicating).

Q. Indicating that you walked directly from the point "H-2" through a door, through the kitchen, and to what is marked as a seat, is that right?

A. Yes, sir.

Q. Marked on the map as a seat?

A. Yes.

Mr. Parsons: And marked "H-33".

The Court: Well, "3" would be all right.

By Mr. Parsons:

Q. That is the point where you stopped?

A. I stopped where the table was out.

Q. This table had been pulled out, is that correct?

A. Yes.

Q. And where was the table—can you illustrate the position of the table?

A. As I recall it, the table was here, (indicating on diagram).

Mr. Parsons: Now, if I may, your Honor, may I have that drawn in blue pencil, the position of the table where he [fol. 328] saw it?

The Court: If you will, Mr. Parsons. Make it the same size as the table.

Mr. Parsons: I will give you a ruler, and that will aid you, perhaps.

A. This is the door here?

Q. That is the door there.

The Court: Draw it lightly first.

A. It could have been over this way.

By Mr. Parsons:

Q. Indicating to the west a little?

A. Yes, sir.

Q. It could have been?

A. Yes, sir.

Q. Are you satisfied now that where you have drawn the position of the table is approximately correct?

A. Approximately; there isn't much room in there at all.

[fol. 329] Mr. Parsons: If I may make that a little heavier, so it can be seen.

The Court: If you will, please.

The Witness: In fact, I am sure it was over a little farther to the west.

Mr. Barnes: I didn't hear that remark?

The Court: The witness said "In fact, I am sure it was over a little farther to the west."

Mr. Parsons:

Q. About how much farther would you say?

A. Well, practically against this cupboard. I am sorry I didn't draw it larger.

Mr. Parsons: Shall I mark this—

The Court: Before you mark it, in view of the fact that the witness has made a correction, I think we should get it definite. I note that the oblong that he has drawn is not the same size as the oblong on the plat. Perhaps by enlarging it he can get it closer to the width he has indicated.

Mr. Parsons: Will you try to enlarge the table so that it will be a little more nearly in the correct position? It is

possible, your Honor, I should take this razor blade and scrape a little of it off.

Mr. Barnes: I think we have a red pencil, if you desire.

Mr. Williams: Would you like to fill in the second one with a red pencil?

Mr. Parsons: Yes, I will. Now, just take your seat, [fol. 330] please. If I may mark the first oblong, your Honor, "H-4".

The Court: You have a red pencil there?

Mr. Parsons: I have a red pencil.

The Court: Suppose you fill the big one in with red, and then the one which is not filled in will be indicated as the one that was first drawn.

Mr. Parsons: So that the first figure which you drew in you have now substituted for that the figure filled in with red, is that true?

A. I think that is more nearly correct, yes, sir.

Q. That more truely reflects the position of the table when you observed it?

A. Yes.

Q. And did you observe anything upon the table?

A. I did.

Q. And what did you observe there upon the table?

A. I saw Mrs. James there tied to the table.

Q. And what position did you take to set the box down, if you will indicate that, please?

A. Her head was up here, and she was tied across the shoulders.

Q. Tied across the shoulders. Where did you put the box?

The Court: Just a minute, so we get the record. Indicatin[illegible] the end of the table which is toward the southwest?

Mr. Parsons: That is true.

A. Her feet were down here.

[fol. 331] The Court: Indicating the opposite end of the table.

A. Mr. James had preceded me, and picked the lady's foot up, and pointed to this seat here in this breakfast nook. As the box was set down there, he stuck this foot in the box.

By Mr. Parsons:

Q. Now, as you set the box down on the seat, did you open the box?

A. That wasn't necessary.

Q. Was the box open or closed?

A. The box was open.

Q. The box was open as you set it down?

A. In fact, he jumped, afraid he was going to get bit himself.

Q. And did the snake come out of the box?

A. No, sir.

Q. And as you set the box down, and the box was opened, and Mr. James jumped, what occurred immediately after that?

A. The snake struck her in the region of the lower part of the foot.

Q. Did you observe that?

A. I saw that, yes, sir.

Q. And where was the box on the edge of the seat?

A. The box was right here, toward the outside.

Q. How far from the west edge of this seat was the box?

A. One end of it was right on the edge of it; the rest of it was back toward the wall.

[fol. 332] Q. And which direction was the glass in the top slid?

A. The glass slid to the east.

Q. And how much of the foot was placed in the box?

A. I don't know.

Q. And then the foot was immediately pulled out, was it?

A. It was, yes, sir.

Q. Was it done something like this, placed in the box like that, and pulled out?

A. Yes, sir.

Q. Just about as I have described?

A. No, sir, faster than that.

Q. Just like that?

A. Just like that, yes, sir.

Q. And then you took the box and immediately left, is that right?

A. Yes, sir.

Q. Took it out to the garage?

A. Took it out to the garage.

Q. Indicate where you were standing at the time the occurrences you have just related took place?

A. Right there.

Q. Now, indicate that again, please, sir?

A. As near as I can tell, the table in there, I was right here.

Q. Have you got it correct now?

A. As near as my memory serves me.

[fol. 333] Q. You hold it, and I will mark it, if I may, your Honor. I have drawn a circle, and if I may, your Honor, mark that "H-4"?

The Court: Suppose you put your notation in the blue pencil, Mr. Parsosn, the circle being in red.

Mr. Parsons: In red, yes. I will mark that "H-4".

Q. Now, the circle indicated upon the plat here in red, and marked "H-4", was the position as near, now, as your best judgment will permit you to state it, the position at which you stood when the occurrences concerning which you have just testified took place, is that right?

A. Yes, sir.

Q. Now, you state that you saw this snake touch the toe of Mrs. James, is that right?

A. I didn't say "toe", sir. I said the lower part of the foot. I would not be sure where it was.

Q. How far did the snake's head travel before it struck the foot?

A. I would say about four inches, three or four inches.

Q. About three or four inches?

A. Yes.

Q. Not any more than that?

A. No, sir, not any more than that.

Q. And in what part of the box was the snake?

A. The box was sitting this way. The snake was coiled in this part of the box right here.

[fol. 334] Q. Indicating the east end of the box?

A. Yes, sir.

Q. And you were familiar with the size of that snake, were you?

A. Yes, sir.

Q. Had you ever seen it before?

A. Yes, sir.

Q. And how long was that snake?

A. Well, I don't know. I would say about three feet long.

Q. Could you give us any description of that snake?

A. No, sir.

Q. Do you know what color that snake was?

A. It was spotted; I don't know what color it was.

Q. Well, the spots, can you describe those?

A. It was black and yellow, if I remember correctly. It was a rattlesnake. It had rattles on it.

Q. Black and yellow. Did you observe how many rattles the snake had upon it?

A. No, sir, I didn't.

Q. Do you recall whether or not you had ever seen that snake prior to that day?

A. Yes, sir.

Q. Where did you first see that snake?

A. At Snake Joe's.

Q. When was the first time you had ever seen that snake?

[fol. 335] A. At Snake Joe's.

Q. When?

A. Saturday afternoon, on August 3rd.

Q. Saturday, August 3rd?

A. Yes, sir, in the afternoon.

Q. That is the first time you had seen that snake?

A. Yes, sir.

Q. And you purchased it, and brought it up in a box, is that right?

A. I did.

* * * * * * *

[fol. 336] Cross-examination (continued).

By Mr. Parsons:

Q. Now, Mr. Hope, you state that this was a rattlesnake that you observed in the box, which you took in the house. Did you at any time hear audibly the sound of any rattles?

A. No, sir, I did not.

Q. At any time while you were in the house you didn't hear that, did you?

A. No, sir.

Q. Now, as you stood in the position "H", you say this lady was strapped on the table marked here in red, is that right?

A. With a rope, yes.

Q. And her legs protruded over the north east end of the table, is that right?

A. Yes, sir.

Q. How much of her body was on this table?

A. As near as I can recall, sir, her legs from her knees [fol. 337] down.

Q. As much as your legs now protruding over the edge of the chair?

A. I would say so, yes.

Q. And as you came by, Mr. James had to move one of the legs so that you could get through, is that right?

A. Yes, sir.

Q. Well, which way did he move the leg so that you could get through? Which way did he move it?

A. Do you want me to show you?

Q. Yes, if you will indicate.

A. The leg was down over the end of the table as I recall it.

Q. They were down over this end of the table, were they not?

A. Yes. He moved it that way.

Q. How is that? You indicated to the northwest.

A. Just a small passageway; as I walked in I had to turn sideways.

Q. Well, that is not the question, pardon me, please, sir.

A. Yes, sir.

Q. If you will just tell me which way he moved her leg?

A. Raised it up and bent it back slightly this way, that would be to the north.

Q. Raised it up off the table, did he?

A. Yes, sir.

[fol. 338] Q. And to one side?

A. A small amount.

Q. That was the leg on the lefthand side?

A. Yes.

Q. Did he leave the right one hang down?

A. Bending over the table, yes sir.

Q. Then after this occurrence, you immediately went outside, is that right?

A. I did, yes sir.

Q. About how long were you in the house at this position near the table?

A. I was there less than five minutes.

Q. And when you went in the house, did you observe particularly this body or rather the form of Mrs. James resting there upon the table? Did you take a look at her?

A. I couldn't help it.

Q. How was she dressed?

A. She was dressed in a nightgown.

Q. What kind of a nightgown, do you know the color?

A. No, I don't.

Q. Can you tell us anything about the nightgown, except it was a nightgown?

A. I don't believe I could, no sir.

Q. Can you tell us whether it was silk or crepe or cotton or flannel, or can you give us any idea of the fabric?

A. I can say it was not flannel.

[fol. 339] Q. It was not flannel?

A. It was not flannel, no sir.

Q. Was anything about it of any distinguishable nature that you could tell us about?

A. No, sir.

Q. Any peculiar characteristics about it?

A. No, sir.

Q. That are in your mind?

A. No, sir.

Q. Then as you stood there you observed that he had tape across her mouth and eyes?

A. Yes sir, I observed that as I walked through the door.

Q. Now, this must have been about 1 o'clock, is that right, a quarter of 1:00 to 1:00 o'clock, is that true?

A. Yes sir, that is true.

Q. This occurrence concerning which you have just testified, and then you went outside, is that correct?

A. I went to the garage.

Q. And when again did you return into the house at all?

A. Between 6:30 and 7:00 o'clock on Monday morning.

Q. Between 6:30 and 7:00 o'clock Monday morning?

A. Yes, sir.

Q. That is the first time from 1 o'clock Sunday that you had been in the house, is that correct?

A. That is correct.

Q. And when you returned in the house Monday morning, what portion of the house did you go to?

[fol. 340] A. Do you wish me to designate on here?

Q. Yes, that is why I am coming over. Just take the rule and indicate where you went Monday morning at 6:30.

A. He came to the garage after me, and the garage is right in here, and came through here and stopped right here.

Q. Where was the body?

A. Right here. (Indicating on diagram).

Q. Now, will you indicate again where the body was lying, you say?

A. Is this the doorway here?

Q. Yes.

A. The head was practically here, about here and the knees about here.

Q. Well, would it be lying along in this position?

A. Correct, sir.

Q. Will you draw the position of the body? Locate it carefully so you won't have to do it the second time.

A. This is the doorway from the hall to the kitchen.

Q. Now, you have the advantage of me, Mr. Hope, you have been in the house and I have not. You just look at it.

Mr. Barnes: May I make an observation? It might be a good thing to call attention to the scale of the map.

The Court: One inch to two feet.

Mr. Parsons: Now, if there is anything I can do to help you with the description, I would be glad to help you with it.

[fol. 341] A. Well, I don't know, but I do indicate here her head and shoulders, while I looked through the door, standing in the kitchen.

The Court: May I suggest that the head was the position of the last "L" there.

A. Yes, sir.

The Court: If you drew a circle there—the feet were toward the bathroom?

A. Yes, sir.

Mr. Parsons: All right. I will make that heavier.

The Court: And let the record show that it is made in red.

Mr. Parsons: I will make it "H-5". Now, "H-5" indicates a position of the body when you saw it about 6:30 in the morning of August 6th, is that right?

A. August 5th.

Q. Was it August 5th.

A. I don't know; it was Monday morning.

Q. It was Monday morning?

A. Yes, sir.

Q. And this part, done heavily in red, indicates the upper portion of the head, that you saw there?

A. Yes, sir.

Q. Now, did you observe whether or not there was any tape upon the face?

A. No.

[fol. 342] Q. Do I understand that you didn't observe that there was any?

A. There wasn't any.

Q. There wasn't any tape?

A. No, sir.

Q. And you had been at the premises of Mr. and Mrs. James from about 1:00 o'clock in the morning, is that right?

A. From 1:00 or 1:30.

Q. And during that time, from time to time, you saw and talked with Mr. James, is that right?

A. Twice.

[fol. 343] Q. Twice. When was the first occasion?

A. When I first arrived there, or shortly after I arrived there.

Q. And you arrived there at 1:00 in the morning?

A. Between 1:00 and 1:30; around there.

Q. That was now on the morning of Monday?

A. That is right.

Q. And how long after you arrived did you first see Mr. James?

A. Almost immediately.

Q. Did he come out and greet you?

A. He came out from the garage, yes, sir.

Q. I understand from your testimony that when you observed him then he had been drinking heavily?

A. As to how much he had, I don't know. He had been drinking. He had a bottle with him.

Q. Well, did he have the appearance of having been drinking?

A. He seemed quite vexed at me.

Mr. Parsons: I move to strike that out. Did he have——

The Court: The answer may remain. It is partially responsive.

By Mr. Parsons:

Q. Had he been drinking?

A. Yes, sir, I could smell it. I didn't see him drink, that is, up until that time.

The Court: Did his actions indicate that he had been [fol. 344] drinking?

A. Yes, sir, they did.

By Mr. Parsons:

Q. And he had a bottle with him, is that right?

A. Yes, sir.

Q. And sat it down in the seat between you, and the two of you then indulged, is that right?

A. Had a couple of drinks, yes.

Q. Had a couple of drinks of whiskey, is that right?

A. That is right.

Q. Were they pretty good sized drinks of whiskey?

A. I wouldn't say so.

Q. Did Mr. James some time after that drink any more?

A. Not in my presence.

Q. Did he at any further time in the morning have something to drink?

A. Not in my presence.

Q. Later on in the morning he gave you a glass of whiskey, did he not?

A. He did.

Q. Did he drink, himself?

A. Not in my presence. He brought it out to the garage.

Q. Did he bring it in a glass or a bottle?

A. He brought a glass. There was already a bottle in the car.

Q. And he brought a glass of whiskey out of the house, is that right?

[fol. 345] A. Yes, sir.

Q. Now, at the time that you returned in the house at about 6:30 in the morning, I understand that you then helped Mr. James take this body outside, is that right?

A. I did.

Q. And by which means did you leave the house? By which exit?

A. The back door.

Q. Just indicate with the pointer, please, what door you went out?

A. Came through this door, this door, and this door.

Q. You walked then from the hallway through the kitchen, through the porch, and out the door "H-1", is that right?

A. That is right, sir.

Q. And down this walk, did you, proceeding down toward the fish pond?

A. That is right.

Q. And how far did you go? Indicate with the pointer?

A. Right here.

Q. Indicate, please, and I will mark it.

A. About there.

Q. I will mark that "H-6" in blue. That is the point at which you stopped with Mr. James while you were both holding the body of Mrs. James, is that right?

A. That is right, sir.

[fol. 346] Q. Is that as far as you went?

A. That is as far as I went.

Q. Where did you last see the form of Mrs. James?

A. On the sidewalk, right there where you have "H-6".

Q. That is the last point at which you saw her?

A. Yes, sir.

Q. And how long after you saw the form of Mrs. James at the point "H-6" was it that you left the premises?

A. I would say within about five or ten minutes.

Q. And you and Mr. James left together, did you?

A. Yes, sir.

Q. Now, you had been in this house how many times prior to August 3rd, before August 3rd?

A. Well, I don't know exactly, but not over—I was never in the house but once except the time that I lived there.

Q. Well, you were ther- for some four or five days, living there, is that right?

A. Yes, sir.

Q. And upon one occasion had you taken a box containing a snake, or snakes, out there?

A. Yes, sir.

Q. And when was that, Mr. Hope?

A. That was the last part of June—or, I mean the snakes that I got the last part of June. It was about the 5th or 6th of July.

[fol. 347] Q. About the 5th or 6th of July?

A. Yes, sir.

Q. That is when you had taken some snakes out there in a box?

A. Yes, sir.

Q. And where did you deliver them there?

A. Mr. James was in the garage, and I left them in the garage.

Q. And did you see anybody there at that time?

A. I did.

Q. Whom did you see, other than Mr. James?

A. Mrs. James.

Q. You saw Mrs. James?

A. I didn't see her. There was some one in the house.

Q. There was somebody in the house?

A. Yes, sir.

Q. Did you go in the house at all?

A. No, sir.

Q. Did you hear voices in the house?

A. No, sir.

Q. Do you know whether or not Mrs. Murphy was there?

A. No, sir, I don't.

Q. Now, did you ever see Mrs. Murphy at the house?

A. Yes, sir.

Mr. Parsons: Stand up, Mrs. Murphy.

(Lady stands).

[fol. 348] Q. Is this the lady whom you saw?

A. That is the lady, yes, sir.

Q. Mr. James' sister? Sit down. Thank you, Mrs. Murphy. When was it that you saw her at the house?

A. I saw her there on a Sunday, a Monday, and I think on a Tuesday.

Q. Sunday, Monday and Tuesday, is that right?

A. That is right.

Q. And in what month?

A. July.

Q. Can you now fix the date for us, approximately?

A. Only by this way: the Saturday preceding—the Sunday preceding Mrs. James' visit to Long Beach, and I think it was one or two days afterward.

Q. Now, you saw Mrs. James leave ostensibly for Long Beach, is that right?

A. That is right.

Q. She was going down to a dental convention, is that right?

A. I don't know where she was going, what convention.

Q. And you saw Mrs. Murphy there at the time Mrs. James left to go to Long Beach, is that right?

A. I don't know whether she was there that day, or not.

Q. Was she there the day before?

A. She was there on the Sunday.

Q. The Sunday before Mrs. James left, is that right?

[fol. 349] A. Yes.

Q. Was Mrs. James there at that time?

A. Mrs. James was there.

Q. And was Lois Wright there?

A. She was there.

Q. Then you saw Mrs. Murphy at the house on one occasion at least after Mrs. James had gone to Long Beach, is that correct?

A. That is correct, yes, sir.

Q. Would you say more than one occasion?

A. Not over two.

Q. Possibly one, or possibly two, is that right?

A. That is right.

Q. And when you were there were you staying over night at that time, upon the occasions when she was there?

A. Yes, sir.

Q. And, of course, you visited with her, and talked with Mrs. Murphy, as well as the rest of the folks in the house?

A. They were in bed by the time I would get there at night.

Q. Did you have occasion to see or talk to either Mrs. Murphy or Mrs. James while you were there?

Q. On one occasion, yes, they were waiting.

Q. Now, during the times that you were out there, upon one or two occasions you saw Mrs. James there alone, did you not?

[fol. 350] A. I never did, no, sir.

Q. Were you ever there at any time while Mrs. James was alone in the house with you?

A. Never.

Q. And there was always either Mr. James or Mrs. Murphy there, is that right?

A. That is correct, or no one. I was there one day by myself.

Q. You were there one day by yourself?

A. That is right.

Q. And when was that that you were there alone?

A. That was during the time that Mrs. James was in Long

Beach. The landlord was over there moving hardwood to make flooring in another house.

Q. Now, can we fix this a little nearer toward the early part of her visit in Long Beach, or the latter part?

A. I don't know how long she was down there.

Q. Did you see her after she returned?

A. No, sir—well, yes, sir.

Q. How?

A. Yes, sir.

Q. When did you first see her after she returned?

A. The 4th of August.

Q. The 4th of August?

A. Yes, sir.

Q. Now, on Sunday, in August, on the Sunday which you [fol. 351] say these events occurred, Mr. James was drinking off and on during the afternoon, was he not?

A. I don't know; I wasn't there.

Q. Then you saw him, did you not, about 1.00 o'clock on Sunday?

A. You say about 1.00 o'clock on Sunday?

Q. Yes.

A. Yes, I saw him.

Q. Had he had anything to drink then?

A. He had, yes, sir.

Q. He had considerable?

A. He had, yes.

Q And when you left, had he been continuously drinking off and on, until you left?

A. Only one or two times in my presence.

Q. Now, when you arrived there on Monday morning about 1:00 o'clock, and you say you left about 7:00 o'clock, or thereabouts——

A. Yes, sir.

Q. Where did you stay that six hours? Where were you?

A. I was in the car in the garage.

Q. You stayed in the car in the garage?

A. Yes, sir.

Q. And how far is that garage situated from the house?

A. Oh, I don't know.

Q. Well, you don't have to point it out. Just give us [fol. 352] the distance in feet.

A. About 20 feet, I would say, or about 25 feet—no, it was farther than that.

Q. How is that?
A. It was farther than that.

The Court: As far as from here to the back wall?

A. No, sir, from about here—about half way to the wall.

By Mr. Parsons:

Q. Well, as far as your position to the railing?
A. It was farther than that.
Q. As far as the first row?
A. I would say the second row.
Q. To the second row?
A. Yes.
Q. And what is you best judgment in feet?

Mr. Williams: I will say, your Honor, that we have a diagram drawn to scale, which shows it.
[fol. 353] Mr. Parsons: Well, I have a way to test his recollection——
The Court: There is no objection as to whether you are trying to fix a distance——

A. 30 or 35 feet.

By Mr. Parsons:

Q. 30 or 35 feet?
A. Yes.
Q. Now, did you get out of the automobile at any time when you arrived, 1 o'clock Monday morning, until you went in the house at 6:30 to aid in the removal of Mrs. James' body?
A. I did go out. I got out and closed the garage doors.
Q. Did you close them?
A. I did.
Q. About what time was that?
A. About 1:30.
Q. And did anybody come in the garage after that?
A. Mr. James arrived immediately after.
Q. And did you remain in the garage with the doors closed while you and he were talking?
A. Yes.
Q. And were the doors opened after that, subsequent to that?
A. Well, when he went out, he opened it and closed it.

Q. He opened it and closed it?
A. That is right.
Q. Did he come back in there again?
[fol. 354] A. About 4 o'clock.
Q. About 4 o'clock?
A. Yes.
Q. Now, where were you at 4 o'clock, sitting in the car?
A. Yes, sir, sitting in the car.
Q. Were you asleep?
A. I had dozed off, yes.
Q. And did you have any conversation with Mr. James at 4 o'clock?
A. Yes, he says, "That is that."
Q. And that is the time that he brought out a pint of whiskey to you?
A. No sir, he brought that out when he came out the first time.
Q. He brought out a pint the first time?
A. I think it was a pint; it was a bottle.
Q. And from time to time during the night you drank it?
A. There was over half of it left in the morning.
Q. It was drank between the two of you?
A. Yes, sir.
Q. About in equal portions?
A. I would say in about equal portions.
Q. And about 6:30, did he return to the garage then?
A. He did.
Q. Were you asleep then?
A. No, I was very much awake.
[fol. 355] Q. You were very much awake then?
A. Yes, sir.
Q. But you had not gone in the house?
A. No.
Q. Did he ask you then to come in the house?
A. He did.
Q. And you went in there with him, is that right?
A. I backed the car out and went in the house.
Q. And then, on that occasion, you did, as you have related, you carried the body out and placed it where you have indicated?
A. Before backing the car out?
Q. Yes.
A. No, sir.
Q. Before backing the car out, did you understand?

A. Yes, sir. I backed the car out and turned around and it was left by the back porch.

Q. Left by the back porch?

A. Yes, sir.

Q. And during this time, June, July, the early part of June, 1935, you were short of money?

A. No, sir.

Q. You had plenty of money?

A. I never had plenty.

Q. Did you have what money you needed?

A. I seemed to be getting along all right, yes.

[fol. 356] Q. How much money did you make in June?

A. I worked all the month of June.

Q. Do you know how much you earned in June?

A. Oh, I would say $110.00 or $115.00.

Q. Who did you work for?

A. For the Corporation Building, and also did a little extra waxing of floors.

Q. You worked for the concern that produced the building there?

A. Yes, sir.

Q. And in July——

A. I didn't work for anybody in July.

Q. You didn't work for anybody in July?

A. Yes, sir.

Q. Did you work in the early part of August?

A. Yes.

Q. Who for?

A. The Thrifty Drug Company.

Q. When did you go to work for them?

A. I don't know; it was the first part of August.

Q. The early part of August?

A. Yes, sir.

Q. And approximately when would you say in August?

A. About the 10th, I would say.

Q. About the 10th?

A. Yes, sir.

[fol. 357] Q. Now, after this occurrence that you have related happened early in August, from time to time you saw Mr. James at the barber shop, is that right?

A. That is right.

Q. And on or about the first of September, you borrowed his automobile and went down to Yuma, is that right?

A. I did.

Q. And when, after the first of September, did you next see Mr. James?

A. Well, I saw him about every two weeks or so.

Q. When you would drop in the barber shop?

A. Yes, sir.

Q. As a patron, is that right?

A. Yes, sir.

Q. Did you obtain any money from him during those visits after August 5th?

A. Yes, sir.

Q. How much?

A. I received $100.00 from him at one time.

Q. And who was it from, Mr. James?

A. Mr. James. He handed it to me underneath the barber cloth.

Q. Now, on Sunday, did you see Mr. James leave the premises at any time that you were there?

A. No, sir.

Q. If he left, you don't know about it?

[fol. 358] A. Right.

Q. Now, when you went back in the house at 6:30 in the morning on Monday morning, did you notice any water on the floor?

A. I didn't notice any, no.

Q. If there was any, you didn't see it?

A. No.

Q. There was nothing that attracted you in any part of the house that you know of, any water on the floor?

A. No, sir.

Q. And her body, such portion as you picked up was dry, was it?

A. Absolutely, yes sir.

Q. And her clothing and the towel that you saw there, the parts that you picked up were dry, is that right?

A. That is right.

Q. And you carried her about the knees, didn't you?

A. Yes, sir.

Q. Her lower extremities?

A. Yes, sir.

Q. And carried her from in the house to the point where you have indicated by the fish pond?

A. Yes, sir.

Q. Now, had you given any study or thought to rattlesnakes prior to this occurrence?

A. No, sir.

[fol. 359] Q. Have you ever made any inquiry into the habits of rattlesnakes, or did you ever know anything about them?

A. I didn't know anything about them.

Q. Had you ever seen one?

A. Not that I know of.

Q. Had you ever had any in your possession?

A. No, sir.

Q. Did you ever have any at your apartment?

A. Yes, sir.

Q. When was that?

A. I took them out of there on the 4th of July.

Q. On the 4th of July, and how long had you had them in your apartment before the 4th?

A. About three or four days.

Q. Is that the only occasion upon which you had had rattlesnakes in your possession, in your home?

A. That is right, yes sir.

Q. At any time in the last year or two?

A. At any time in my life.

Q. Had you ever seen any dried rattlesnake venom?

A. Yes, sir.

Q. You have seen it, sort of golden or yellowish crystals?

A. Yes, sir.

Q. And you have some of those crystals in your possession, have you not?

A. I did have. I gave them to Mr. James.

[fol. 360] Q. And you knew, did you not, that those crystals are as virile as the active venom itself, did you not?

A. I don't know anything about it.

Q. Isn't it a fact that you knew that all you have to do is to scratch the hands and let the blood come and rub the crystals upon the scratch and it is immediately absorbed into the blood stream as effectively as if administered by the fangs of a snake or a hypodermic needle?

A. No, I didn't know that.

Q. You didn't know that; but you did know that they were dangerous, did you not?

A. No, I didn't think it was poisonous.

Q. When was it that you had those crystals in your possession?

A. When I was first sent to get this bunch of snakes I was supposed to have——

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[fol. 361] By Mr. Parsons:

Q. When is the date?
A. I don't know the date.
Q. Approximately?
A. The last part of June.
Q. Where did you acquire these crystals?
A. From the gentleman I got the first snakes from. I was instructed to tell him it was for experimental purposes.

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Mr. Parsons:

Q. What was the name of that man?
A. Mr. Kirby.
Q. At Long Beach?
A. Yes, sir.
Q. Is that where you obtained the crystals?
A. Yes, sir.
Q. Where did you see Mr. Kirby in Long Beach?
A. At his place of business.
Q. Where was that?
A. The street I don't know.
Q. Can you tell us approximately in Long Beach where it was?
A. Well, I am not familiar with the streets in Long Beach; I can't tell you, no sir. It was——
[fol. 362] Q. Do you know where the pier is?

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Mr. Parsons:

Q. If you can tell us, tell us; describe it somehow.
A. Well, as near as I remember you go down the boulevard east from Long Beach, down to the junction of the road.
Q. The boulevard east from Long Beach?
A. You go about a mile and a half, and it is at the junction of a road. It is a road "V". They had, I don't know what you call it, some sort of a circus for children there, a

little merry-go-round and various other amusements for children.

Q. Did you purchase this dried venom from him?

A. No sir, it wasn't purchased from anyone.

Q. How much of a quantity did you obtain?

A. It was in a small jar, a cold cream jar.

Q. Well, are you familiar with ounces?

A. No sir, I am not. A little jar about like that.

Q. A jar about two inches high?

A. Yes, sir.

Q. And an inch and a half or say, two inches in diameter?

A. It was about that big around.

[fol. 363] Q. It would be about an inch and a half in diameter?

A. It was about half full.

Q. About half full. And is that the only time you ever had any dried venom in your possession?

A. Yes, sir. I didn't know then what it was; I didn't know what they called it.

Q. What did you ask for?

A. I asked for rattlesnakes.

Q. And did the man say anything about this material when he gave it to you?

A. Now, if I may answer that, I will explain how I got it.

Q. I am not interested in that, sir. Did the man tell you what this product was, when he gave it to you?

A. He said, "If you are——"

Q. You can answer that "yes" or "no".

The Court: Not necessarily, Mr. Parsons.

By Mr. Parsons:

Q. Did the man tell you what that product was?

A. I believe he did.

Q. Do you know what name he called it?

A. No, sir.

Q. Now, after that, did you ever see any more of a product that looked similar to that?

A. No, sir.

Q. Upon any occasion?

[fol. 364] A. On no occasion.

Q. At any time have you ever performed any experiments with purported rattlesnake venom to see its effects upon animal life?

A. I never performed any experiment of any kind.
Q. With rattlesnake venom?
A. With anything.
Q. With anything. Now, upon one occasion while you were at the James' home, didn't you see Mrs. James alone?
A. No, sir.
Q. Not even for a few minutes?
A. I never have——

Mr. Barnes: Just——

A. (Continuing)—seen Mrs. James alone.

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By Mr. Parsons:

Q. Now, Mr. Hope, had you ever indicated or said to Mr. James or to any other person that you had any knowledge of medicine or medical science?
A. No, but Mr. James told his sister that.
Q. In your presence?
A. In my presence.
Q. And you didn't deny it, did you?
[fol. 365] A. No sir, I did not.
Q. Now, did you ever have any knowledge of medicine?
A. Never have, no sir.
Q. At any time?
A. No. And neither did I deny the name that he introduced me by when his niece was right there and knew my right name.

Mr. Parsons: I move to strike that out.
The Court: It will be stricken out.

Mr. Parsons: It has been suggested to you by the officers, has it not, that you give as much of a story as you can in response to my questions?
A. That is what I was doing, sir.
Q. Yes, and you were coached right here in the back room by some of the officers in charge of this case as to methods in which you should reply to some of my questions?
A. That is not true.
Q. And didn't you——

The Court: Just a minute, counsel. Are you asking these questions in good faith?
Mr. Parsons: Absolutely.

The Court: You will establish the fact?

Mr. Parsons: If the persons will admit it. They were seen talking here in the hallway.

The Court: The mere fact that people were seen talking does not prove what they were talking about.

Mr. Parsons: We have a right to draw just inferences. [fol. 366] The Court: I know, but when you get to accusing an officer of the court without any better foundation than that you saw him talking, without knowing what he was talking about, I think you are going too far. You may proceed.

By Mr. Parsons:

Q. Now, as a matter of fact, during the preparation of this case you have been taken out of the county jail, have you not, out to the James' home with the officers?

A. Yes, sir.

Q. And you have had meals with the officers outside of the county jail, haven't you?

A. During investigation, yes sir.

Q. The question is, you have had meals with them, haven't you?

A. Yes, sir.

Q. And how many times have you been out of the county jail with some of the officers in connection with the preparation of this case?

A. I have been out of the county jail with the officers in connection with the preparation of this case one time.

Q. To what place did you go?

A. I went to my home and to the United States Post Office to get my bonus.

Q. And you went out to the James' home, did you not?

A. I didn't leave the county jail to go to the James' home, no sir.

[fol. 367] Q. Didn't you go out there and help bring the wire fence in?

A. I was out there at the same time Mr. James was, yes sir.

Q. And you were out there with the officers weren't you?

A. So was he.

Q. But you were there, weren't you?

A. Yes, sir.

Q. And from time to time you have had conversations with the officers who have been preparing this case, have you not?

A. I was being examined myself.

Q. The question is, you have had conversations with the officers.

A. I have had conversations, yes sir.

Q. And which officers have you talked with?

A. I have talked with no less than 7 or 8 officers.

Q. You have talked to Mr. Littleton, have you not?

A. I have.

Q. And you have talked to Mr. Southard?

A. I have.

Q. And do you see those gentlemen here in the court room?

A. I do.

Q. Indicate who they are.

A. The two gentlemen sitting right there.

Q. This is Mr. Littleton, and this is Mr. Southard, is it [fol. 368] not?

Mr. Williams: Stand up, Mr. Southard, and Mr. Littleton.

(Gentlemen stand in courtroom.)

A. That is right, yes sir.

By Mr. Parsons:

Q. And you talked to Mr. Littleton back here in the anteroom, did you not?

[fol. 369] A. I think Mr. Littleton gave me a cigarette.

Q. You had a conversation with him, did you not?

A. In the presence of two bailiffs.

Q. And in the presence of your attorney, did you not?

A. I don't know whether he was there, or not.

Q. Now, you talked with Mr. Fitts, did you not?

A. Yes, I'll say I did.

Q. Yes. And you have talked with others in the District Attorney's office, have you not?

A. Yes, sir.

Q. Officers in charge of this case?

A. Yes, sir.

Q. And you, of course, have discussed it with your attorney, Mr. Cuff?

A. Yes, sir.

Q. And have you discussed your proposed testimony here with anybody?

A. No, sir.

Q. Not a word?

A. I beg your pardon?

Q. Not a word of it?

A. Not a word with anybody.

Q. Now, Mr. Hope, when you were arraigned here in the Superior Court just two or three days before the trial of this case, the Indictment in this case was read to you, was it not?

[fol. 370] A. Yes, sir.

Q. By the District Attorney?

A. Yes, sir.

Q. In charge of this case?

A. Yes, sir.

Q. And upon your being asked to state your plea, whether you were guilty or not guilty to the charge contained in the Indictment here, you said you were guilty, did you not?

A. I did.

Q. You personally interposed that plea, did you not?

A. Yes, sir.

Q. Now, going back to another matter when you arrived out at the James home on Sunday night, in the early part of August, do I understand that you state that you saw some dead chickens in the garage?

A. Yes, sir.

Q. How many?

A. Oh, I don't know; there was four or five of them.

Q. That was just a few moments before you picked up the box with the rattler in it and took it in the house, is that right?

A. That is right, yes, sir.

Q. Now, when you last saw Mrs. James on the morning of Monday morning, she was dead?

A. I thought she was, yes, sir.

Q. And when you had seen her last prior to that was the [fol. 371] previous afternoon, is that right?

A. Right.

Q. At that time she was apparently alive, is that right?
A. Yes, sir.
Q. You didn't speak to her, or say anything to her?
A. No, sir. There was not a word spoken in the house.
Q. Not a word said by anybody?
A. No, sir. Your Honor, may I have a glass of water, please?

The Court: Yes. Mr. Perdue, give the witness a glass of water, please.

By Mr. Parsons:

Q. Now, Mr. Hope, you knew, did you not, when you were out at the James home upon this last occasion in August, in the early part of August, that Mrs. James was in a family way, pregnant, did you not?
A. So I had been informed.

Mr. Parsons: That is all.

Redirect examination.

By Mr. Williams:

Q. Mr. Hope, you said something about having delivered this dried venom to Mr. James. Did you have any conversation with him at the time you delivered it to him?
A. Yes, sir I did.
Q. Will you state what the conversation was?

Mr. Parsons: Will you state the time and place, please?

[fol. 372] Mr. Williams: Just tell us as nearly as you can the time and place where you had the conversation?

A. The time I moved out there I had this little bottle of stuff—I had forgotten all about—in my suitcase. I had received this from Mr. Kirby when I was down procuring the first three rattlesnakes. My story that I was to tell at that time, that I was conducting experimental purposes, and Mr. Kirby very kindly gave this to me to continue my experiments with, and I really didn't know what it was, only that he said it was dried whatever they call it, from a rattlesnake.
Q. Now, who told you to tell the story that you were engaged in experimental work?
A. Mr. James.
Q. Was that before you went to Kirby?
A. Yes.

Q. Now, when you gave this bottle to Mr. James, this bottle of venom, what conversation did you have with James?

A. He said he didn't want it.

Q. What did you do with it?

A. I don't remember what became of it. I may still have it; I don't know.

* * * * * * *

[fol. 373] MRS. EDNA HOPE, called as a witness in behalf of the People, being first duly sworn, testified as follows:

* * * * * * *

Direct examination.

By Mr. Williams:

Q. Mrs. Hope, you are the wife of Charles H. Hope, who just left the witness stand?

A. Yes, sir.

Q. Do you remember the 3rd day of August, 1935?

A. Yes, sir.

Q. Did you see Mr. Hope on that day?

A. He called for me where I was working, between 1:30 and 2:00 o'clock.

Q. And did you go someplace with him?

A. Yes, sir.

Q. Did you observe the make of car in which he was riding at that time?

A. He was driving a Plymouth sedan.

[fol. 374] Q. And did you observe the color of that car?

A. It was a little tan car.

Q. Did you observe the license and registration in the car?

A. I had observed that the car was registered to Lois Wright.

Mr. Parsons: I move to strike that out.

The Court: That is merely a description of the automobile.

By Mr. Williams:

Q. When you started out that day, where did you go?
A. Over Colorado Boulevard to Pasadena.
Q. And to what point did you go?
A. We stopped someplace on the way and had lunch at a lunch place, and I don't remember the street, but we drove in front of a snake farm, I believe.
Q. Did you go into the place?
A. No, sir, I didn't get out of the car.
Q. Did Mr. Hope go in the place?
A. Mr. Hope took a box and went around to the side of this barn.

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By Mr. Williams:

Q. Did anybody come with him?
A. I saw a man with him in the yard, and he came back to the car.
[fol. 375] Q. Did you recognize that man in the yard?
A. Yes.
Q. And do you see him here in the courtroom?
A. I saw him back there a while ago. I believe they called him "Snake Joe."
Q. The gentleman that just stood up?
A. Yes.
Q. And after Mr. Hope came up, did he come back to the car again?
A. Yes, sir.
Q. Did he have a box with him?
A. He had a box which he put in the car.
Q. Where did you go then?
A. We drove back to Los Angeles, and he let me out where I lived. He stopped to telephone. He came back to the car and left me there.
Q. Did you see him again afterwards?
A. That evening later, between 7:00 and 7:30, I would say. We were driving our car at that time.
Q. Did you spend that evening with him?
A. Yes, sir, I spent that evening with h. We went down and had dinner, and went to a show.
Q. Then on the following day did you see him?

A. The following morning I saw him between 9:30 and 10:00 o'clock. He had breakfast with me.

[fol. 376] Q. Thereafter did you go someplace?

A. He told me he had to be out——

Q. Never mind what he said.

A. Well, we went to La Ca· ada.

Q. How did you go to La Canada?

A. In our coupe.

Q. Do you know where the James place is in La Canada?

A. I have seen it since then.

Q. Did you go to a place near that place?

A. He parked the car a block away from the James place.

Q. And then what did you do?

A. He told me to wait for him there, and that he would be back in half an hour.

Q. Did he leave you there?

A. Yes, sir.

Q. Did you see him again later?

A. He came back within 15 or 20 minutes. He told me he would not go back——

Mr. Clark: That would be hearsay.

The Court: What he said will be stricken.

A. He came back to the car.

By Mr. Williams:

Q. When he came back did he have some conversation with you, without saying what is was?

A. Yes, sir.

Mr. Clark: Just a moment.

The Court: You may proceed.

[fol. 377] Mr. Williams: I understand that counsel——

Mr. Clark: I was going to object, but I do not think that it is of enough importance to delay the Court.

By Mr. Williams:

Q. Was there an answer to that question?

The Court: "Yes."

By Mr. Williams:

Q. After you had the conversation, what did you do?

A. I drove back to Los Angeles.

Q. Did he go with you?

A. No, sir.

Q. Did you see him again later that day?

A. Yes, sir.

Q. When and where?

A. I saw him a little bit before two o'clock.

Q. Where?

A. I was visiting a friend of mine, and as I came out the front he drove up in front of the place in Mr. James' car, and honked the horn.

Q. Where was that?

A. The corner of Willowbrook and Macy Street.

Q. That was what time?

A. A little before two o'clock.

Q. What then did Mr. Hope and you do?

A. I followed him around several blocks to where I lived, in our car, and got into the car with him, and drove back out to Pasadena.

[fol. 378] Q. Now, before coming to your driving back to Pasadena, when you got into the James car with him, did you observe anything?

A. I notice some boxes in the back of the car. There was also a bad odor about the car.

Q. Was there anything done with these boxes, or sacks, at that time?

A. He took a sack out of the car.

Q. What did he do with it?

A. Put it in the back of the Durant.

Q. The Durant being your car?

A. Yes, sir. I parked it right beside there.

Q. Then where did you and Mr. Hope go? Out to Pasadena again?

A. Out to Pasadena, where we went the day before.

Q. Did Mr. Hope get out of the car?

A. Yes, sir, he got out of the car, and took the box inside. He took the box inside, and was in there several minutes, and he and this chap came out.

Q. By "chap" who do you mean?

A. His name is "Joe", I believe.

Q. Snake Joe?

A. Yes. They went to the corner. I turned and went down to the boulevard, honking my car.

Q. Did Mr. Hope then come out?

A. Yes, sir, he came out then.

[fol. 379] Q. Where did you go then?

A. Down towards Venice beach.

Q. On the way down there did you and Mr. Hope do anything?

A. On La Cienega Boulevard Mr. Hope took a box and threw it in the weeds.

Q. About what time of the day or night was that?

A. It must have been about 4:30.

Q. Then where did you go?

A. We started back, and started east on Venice Boulevard, and back to Los Angeles, and he had another box that he threw out, that had a glass top on it, by the railroad there.

Q. From there where did you go?

A. We went back to Los Angeles, and stopped and had something to eat, and he had an engagement to play cards.

Q. Did you go over there with him?

A. Yes, Mr. Hope and I went together.

Q. You were in James' car?

A. Yes, sir, we were in Mr. James' car.

Q. And where did you go?

A. He took me home.

Q. And then he left you?

A. Yes, sir, and then he left me.

Q. That was on what day of the week?

A. That was on Sunday.

Q. That was the day following the 3rd of August?

A. Yes, sir.

[fol. 380] Q. Did you see Mr. Hope again that night?

A. No, sir.

Q. Did you see him the next day?

A. I saw him the next morning as I was getting my breakfast, around 8:00 o'clock, or between 8:00 and 8:30.

Q. At what place?

A. At my home.

Q. And did he come into your home?

A. Yes, sir.

Q. And did you observe his appearance, and his demeanor and manner at that time?

A. Yes, sir.

Q. What was it?

The Court: Just one moment.

Mr. Clark: There will be no objection.

The Court: You may answer.

A. He was white and jittery, and had been drinking.

By Mr. Williams:

Q. Did you and he go any place then?

A. He took me to work.

Q. Did you see him again that day?

A. Around noon time. He came after me, and took me back to the apartment.

Q. When you got to the apartment did you see anything?

A. There was a blanket around a bundle in the middle of the floor, and another blanket. One blanket was wrapped up like a bundle.

[fol. 381] Q. Now, what, if anything, was done with those blankets, if you know?

A. I sent the blanket, a white checked blanket, to the laundry. I had some laundry to go. He said he had some laundry.

Q. What did he say? He sent the blanket to the laundry, you say?

A. Yes, sir, he sent the blanket to the laundry. We had a bundle of laundry, and we took it.

Q. Then where did you go?

A. Back to the office.

Q. When you got back to the office did Mr. Hope drive you in his car?

A. He got off and said he had things he wanted to burn.

Mr. Clark: Just a moment.

The Court: Well, that part may be stricken.

A. I saw him place a bundle in the incinerator back of the place. It had the appearance of a gunny sack.

By Mr. Williams:

Q. I show you a blanket which has been marked as People's Exhibit 16, and ask you if you recognize that?

A. Yes, that was the blanket that was on the floor.

Q. And do you recognize either of the blankets, People's Exhibits 17 and 16?

A. Yes, sir. The other was in the car.

Q. And referring to People's Exhibit 15?

[fol. 382] A. Yes. The other blanket was in my laundry bundle when it came back. I didn't see it until it was returned from the laundry.

Mr. Williams: That is all. You may cross-examine.

Cross-examination.

By Mr. Clark:

Q. Mrs. Hope, you have already been informed, before you took the stand here, that your husband is awaiting sentence for the murder of Mrs. James?

A. Yes, sir.

Q. You love your husband, do you not?

A. Yes, sir.

Q. You are desirous of helping him as much as you can in his present difficulty, aren't you?

A. I am.

Q. What time Monday did you say it was that you saw your husband?

A. Between 8:00 and 8:30.

[fol. 383] Q. How long were you with him?

A. I had to be at work at 9 o'clock. It was probably 30 or 40 minutes.

Q. You saw no more of him that morning?

A. I saw him from 9:00 until noontime.

Mr. Clark: That is all.

• • • • • • •

Q. And when you told the facts to the District Attorney's office, you then loved your husband, didn't you?

[fol. 384] A. Yes, sir.

Q. And you then wanted to help him all you could, didn't you?

A. Yes, sir.

• • • • • • •

Mrs. Ethel Smith, called as a witness in behalf of the People, being first duly sworn, testified as follows:

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Direct examination.

By Mr. Williams:

Q. Mrs. Smith, do you know the defendant in this action?

A. Yes, sir.

Q. Are you related to him?
A. Yes, sir.
Q. What is the relationship?
A. He is my uncle.
Q. Did you know Mary James during her lifetime?
A. Yes, sir.

• • • • • • •

[fol. 385] By Mr. Williams:

Q. Do you remember the day of August 4th, Sunday, 1935?
A. Yes, sir.
Q. Were you at or near the residence of Mr. James at 1329 West Verdugo Boulevard in La Canada on that day?
A. Yes, sir.
Q. And who was with you?
A. My husband and my mother-in-law and my father-in-law.
Q. By what means did you arrive at that place?
A. In our car.
Q. What time of the night or day did you arrive there?
A. 3 o'clock in the afternoon.
Q. Just state what you did at or about the premises.
A. We drove up in the yard and the car was gone. I said, "They are not at home."
Q. Never mind what you said. Now, just tell what you did without saying anything that anybody said during the time that you were there.
A. I got out of the car and tried the back door, and the back door was locked. I sat down and wrote a note and [fol. 386] stuck it in the front door, and then I went around the house and my mother-in-law and father-in-law and they were standing by the kitchen. I walked all through the yard, the front yard, and alone I went in the back yard and picked some oranges and plumbs.
Q. Now, did you look into the house?
A. I tried and the shades were all down.
Q. Was that true all around the house?
A. Yes, sir.

Mr. Williams: May I have the exhibits, please, in the basket?

Q. How long were you at the house, Mrs. Smith?
A. 15 or 20 minutes.

Q. I will show you now a piece of paper which has been marked People's Exhibit 3 for identification and ask you to examine that and state whether you recognize that.

A. Yes, sir.

Q. What is it?

A. It is the note that I wrote.

Q. After writing it what did you do with it?

A. I stuck it in the crack in the front door.

Q. That is the door that opens on the front porch of the James' house?

A. Yes, sir.

Q. And about what time of the day was it?

A. About 5 o'clock.

[fols. 387-388] Q. On Sunday?

A. Yes, sir.

• • • • • • •

[fol. 389] Q. Now, Mrs. Smith, I wish you would try to speak loud enough that I can hear you. I know it is difficult, but it is necessary that everybody in the court room be able to hear what you say. Did you have a conversation with Mr. James at that time?

A. Yes, sir.

Q. Just state the conversation.

Mr. Clark: That is objected to upon the ground that no foundation has been laid in that the corpus delicti has not been proved, without the declarations or admissions of the defendant, and that the evidence is incompetent.

The Court: Objection overruled.

Mr. Williams: Just state the conversation, Mrs. Smith.

A. He said he found my note Monday night. He said, "Why were you there on Monday? Were you leaving on your vacation?" I said, "No, I was there Sunday." He said, "You were?" and I said, "Yes." He said, "Where did you go when you left there?" and I said, "We drove up to Mount Wilson" and he said he did too, with his wife, Mary.

Q. What else was said?

A. He asked me if the officers were there to take your names as you drove up into the mountains, and I said, "No."

Q. Was that the extent of your conversation?

A. Yes, sir.

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[fol. 390] Q. Mrs. Smith, shortly after the marriage, did you see the defendant, James, at your house?

A. I don't remember.

Mr. Parsons: I can't hear you.

A. I don't remember.

By Mr. Williams:

Q. Well, did a trunk come to your house?

A. Yes, sir.

Q. Did you have any conversation with Mr. James about that trunk?

A. Not at that time.

Q. At any time?

A. Several days later.

[fol. 391] Q. All right. Where did you have the conversation?

A. It may be over the telephone, I don't know.

Q. What was said?

• • • • • • •

[fol. 392] A. I told him that when I came home I found his trunk and he said, "Yes", he brought it out.

Q. Where did you find that trunk?

Mr. Clark: That is objected to upon the ground that it is irrelevant.

The Court: Overruled.

A. Sitting on the back porch.

By Mr. Williams:

Q. What, if anything, did you do with the trunk?

Mr. Clark: That is also objected to on the ground that it is irrelevant.

The Court: Overruled.

A. Put it out in the garage.

By Mr. Williams:

Q. Thereafter, did you put anything into that trunk?

Mr. Clark: That is objected to upon the ground that it [fol. 393] is both irrelevant and immaterial.

A. No, sir.

Mr. Williams: Stand up, Mr. Griffen.

(Gentleman stand- in courtroom.)

• • • • • • •

[fol. 394] Mr. Clark: If your Honor please, to expedite matters, it will be stipulated by me that there was a certain occasion when Mr. Griffen was out to the house of the wit-
[fols. 395-397] ness and when her attention was directed to this trunk.

Mr. Williams: That will help. I accept that.

Q. Now, I show you some rope, which has been marked People's Exhibit No. 11 for identification, and ask you whether or not you have seen that rope before?

A. I have.

Q. When and where?

A. Taken out of the trunk in the garage.

Q. And by "the trunk", what trunk do you refer to?

A. My uncle's trunk.

Q. And by whom was it taken out?

A. Mr. Griffen.

Q. In your presence?

A. Yes, sir.

The Court: So it may be identified, when you say "the trunk", which trunk do you mean?

A. My uncle's trunk.

The Court: That was Mr. James' trunk?

A. Yes, sir.

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[fol. 398] CHARLES GRIFFEN, called as a witness in behalf of the People, being first duly sworn, testified as follows:

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Direct examination.

By Mr. Williams:

Q. Mr. Griffen, what is your occupation?

A. I am Assistant Chief of the Bureau of Investigation of the District Attorney's Office of Los Angeles County.

Q. Are you acquainted with Ethel Smith who was recently on the witness stand?

A. I am.

[fol. 399] Q. Did you visit her house within the last few months or weeks?

A. I was there on the 8th day of May, this year.

Q. And at that time, did you observe a trunk in the garage?

A. I did.

Q. And did you open and examine the contents of that trunk?

A. I did.

Q. I will show you now People's Exhibit No. 11 for identification and ask you whether you at that time saw this exhibit?

A. I did.

Q. Where did you see it?

A. Found it in the trunk that was pointed out to me by Mrs. Smith.

Q. Did you, at that time, make any mark of identification upon the rope?

A. I did. On each cut end I place the initial "G".

Q. Is that rope, so far as you can tell now, in the same condition as it was at the time you got it?

A. I can tell by examining all of the ends. It is.

Mr. Williams: We offer this in evidence at this time, if your Honor please, as people's Exhibit No. 11.

Mr. Clark: Just one moment. I think I will have to object to the rope, your Honor, upon the ground that it is both [fol. 400] irrevelant and incompetent, that it has not been in any way identified as having been used for any unlawful purpose and no foundation has been laid in that respect for its introduction.

The Court: It will be received at this time as Exhibit 11, under the rule as to similar objects, it having been declared by the witness Hope to be similar to the rope which was used and which he saw used.

* * * * * * *

Roland H. Kirby, called as a witness in behalf of the People, being first duly sworn, testified as follows:

* * * * * * *

Direct examination.

By Mr. Williams:

Q. What is your occupation, Mr. Kirby?
A. Research work.
Q. Where are you located?
A. At the present time in Long Beach, California.
Q. Were you located in Long Beach, California, in the month of June and July, 1935?
A. Yes, sir.
[fol. 401] Q. At what place in Long Beach?
A. On the corner of Terminal and Midway.
Q. And where is that?
A. It is east on Ocean Avenue to the Belmont Bar, possibly a block and a half.
Q. What is the nature of the business there?
A. It is known as a "Kiddie Ride", for children, an amusement ride.
Q. Did you have at that time any interest in that place?
A. I did.
Q. Do you know Charles H. Hope, who was on the witness stand earlier in the day?
A. I do.
Q. Where did you first see him?
A. Well, I don't know the exact date, but approximately some time between—I would say some time in July, before the 10th of July.
Q. Of what year?
A. Of last year
Q. Where did you meet him?
A. He came to my place of business.
Q. Did he at that time purchase anything from you?
A. Yes, sir.
Q. What?

* * * * * * *

[fol. 402] A. Rattlesnakes.
Q. How many?
A. Three.
Q. Were those rattlesnakes paid for by you?
A. Yes, sir.
Q. How much?
A. $5.00, if I remember right, more or less.

Q. Did you at that time deliver to him anything other than rattlesnakes?

A. I did.

Q. What?

A. Some crystallized rattlesnake venom.

Q. And in what sort of a wrapping, or container was that?

A. A small jar.

Q. What conversation, if any, was had between you and [fols. 403-407] Mr. Hope at that time?

• • • • • • •

[fol. 408] By Mr. Williams:

Q. Now, Mr. Kirby, I will repeat the question. What was the conversation had between you and Mr. Hope at the time of the transaction concerning which you have just testified?

A. He asked if I had some snakes with fangs, and poison, practically the same as you would find in the wilds, and I said "Yes." He purchased three snakes from me, telling me that it was for research work, and experimental purposes. I, myself, being interested in that line of work, voluntarily offered him some crystallized rattlesnake venom, which might be of some use in his experiments.

[fol. 409] Q. Was that the extent, or the substance of the conversation that you had at that time?

A. Yes, sir.

Q. Did you see him at a later time?

A. I did.

Q. How soon after the first time was it that you saw him the second time?

A. Sometime after the 10th of July.

Q. Mr. Kirby, you say you have been engaged in research work in connection with snakes for some considerable period of time?

A. I have.

Q. How long?

A. Oh, 11 years I would say, approximately.

Q. And during that period of time what has been the work that you have done?

A. Lecturing to biology classes, also a little bit of show work, exhibits, nature study classes.

Q. Have you made any particular study of the rattlesnake?

A. I have been called on experiments that have been taking place at different institutes in regard to the effect of snake poison.

Q. Have you ever seen a snake bite anybody?

A. Yes, sir.

Q. A rattlesnake?

A. Yes, sir.

[fol. 410] Q. And whom?

Mr. Clark: Is that material?

The Court: Well, it might be.

Mr. Clark: All right.

A. Well, I have received a bite, myself.

By Mr. Williams:

Q. Now, I will show you a small vial and ask you to examine that and state whether you know the substance which is in that bottle?

A. Yes, sir.

Q. What is it?

A. That is crystallized rattlesnake venom.

Q. Is it similar in character to that which you gave to Mr. Hope?

A. Yes, sir.

Q. I will show you another vial, and ask you to examine that, and state what that contains?

A. Those are the main fangs, and secondary and third fangs of rattlesnakes.

Q. Are you able to tell from among these which is the main fang?

A. Yes, sir.

Mr. Williams: I wonder, if your Honor please, if it would be satisfactory if we had him remove a couple of the main fangs from this bottle. I am not interested in the other fangs particularly.

The Court: I think so, yes.

[fol. 411] Mr. Clark: They have been sterilized, I take it, haven't they, sir?

A. No, sir.

Mr. Williams: I may say to counsel that in handling these things that I am informed that one should be very careful not to scratch the skin, because it might be serious.

Mr. Clark: That is why I asked. I didn't ask the question facetiously.

By Mr. Williams:

Q. This object which you have just removed from the vial is what?

A. That is what is termed the cup fang, or in other words, the main fang.

Q. Is that the fang through which the poison is injected when the snake bites?

A. Yes, sir.

Mr. Williams: May we, for the purpose of illustration, offer this fang in evidence at this time?

The Court: I think it would be better if it were enclosed in something.

Mr. Clark: I have no objection, other than the general objection that has been urged heretofore, so long as it is offered merely for the purposes of illustration.

Mr. Williams: I have a glass vial which the witness has very kindly given to me, your Honor. I will put this fang in the vial. I don't know whether I will, or not. It doesn't slip into this vial. The witness has handed me a little box [fol. 412] containing three fangs, if your Honor please. May I offer those in place of the one fang offered?

The Court: Just one thing, I think it would be so much better if we had some sort of a vial to put them in.

Mr. Williams: Suppose I offer them in this box, and get a vial in the meantime.

Mr. Clark: I have no objection, your Honor, to any change in receptable that may be necessary or convenient, and I make no objection, other than the general objection that was interposed.

The Court: I just want to ask Mr. Kirby one question. Those three are each of them main fangs?

A. Two of them are cup fangs, and the other is a secondary fang.

Mr. Williams: You had better remove the secondary fang.

A. All right.

Q. Now, this box contains two main fangs, is that correct?

A. Correct.

The Court: Now, previous to that you introduced another exhibit, or referred to one. We will mark the vial contain-

ing the rattlesnake venom 18 for identification only, and 19 is the box containing the two cup fangs.

By Mr. Williams:

Q. Now, Mr. Kirby, what is the effect, so far as the matter of pain is concerned, resulting to the individual struck by the bite of a rattlesnake?

A. There is a great deal of suffering with it, very severe [fol. 413] pain, later on becoming nauseated to your stomach, and beginning of swelling; in a short time after that the discoloration gradually beginning to follow the swelling up.

Q. In the case of your own bite, for how long did the swelling continue to increase?

A. Approximately 36 hours after I received the bite I had reached the top, or in other words, the peak of the swelling and discoloration.

Q. And how long did the pain continue?

A. Clear through to the 36th hour, and I was bothered with severe sharp pains thereafter for several weeks.

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[fol. 414] Mike Allman, called as a witness in behalf of the People, being first duly sworn, testified as follows:

* * * * * * *

Direct examination.

By Mr. Williams:

Q. Mr. Allman, what is your occupation?

A. I am a showman at the present time.

Q. What particular kind of a show do you operate?

A. We run a reptile exhibit.

Q. Where?

A. At the present time at Long Beach, but I have been connected with Ocean Park.

Q. During the month of July, 1935, where was your exhibit?

A. About 200 out on the pier, No. 200.

Q. That is Ocean Park, California?

A. Yes, Ocean Park.

Q. Now, just state generally what the general nature of that Exhibit was?

A. We have about between 150 and 200 snakes of different kinds, all kinds that you can really purchase all over the United States, practically.

Q. Where do you keep the snakes?

A. We keep them in the pit. We have boxes made back underneath, with doors on them. We let them go back in there to bed at night, and then lock them up. They stay [fol. 415] in there all the time.

Q. Describe the pit.

A. It is about 30 by 40; somewhere in that neighborhood, inside.

Q. Is it oblong, round or square?

A. It is squared off.

Q. Where do the people stand to look in?

A. We have a railing on it something like this, only a little higher, with the top covered with burlap, and padded so the people can rest on it.

Q. The people who are observing the snakes are standing higher than the floor of the pit?

A. Yes, the floor of the pit sets down 7 feet underneath.

Q. During the month of July did you get into that pit and give exhibitions with snakes?

A. Yes, sir.

Q. Do you know the defendant, sitting in this courtroom?

A. Yes, sir.

Q. And do you know Charles Hope, who a little earlier in the day testified on the witness stand here?

A. Yes, sir.

Q. When and where did you first see these men?

A. I was working one afternoon. There was about eight or ten people in there, and I didn't notice them come in at first, but as they drift in one or two at a time, I don't know [fol. 416] whether they came in separate, or together, because I didn't see them come in, but it seems to me they had a couple of drinks, and they both got noisy to start with, and I have had lots of people in my place do the same thing, and I ignore them, don't pay any attention to them, but they kept getting noisy and annoying other people, and I began to get annoyed, myself, so I turned around——

Mr. Clark: I think it should be question and answer, your Honor.

Mr. Williams: I didn't hear what Mr. Clark said?

Mr. Clark: One of the reasons I interrupted, your Honor, the general objection that I made before the argument will be deemed to apply to the same subject matter in this witness' testimony?

The Court: Yes.

By Mr. Williams:

Q. Did you have any conversation with this defendant?

A. Yes.

Q. State what the conversation was.

A. I explained all the snakes to them, first, and they listened to it, and finally they kept insisting I didn't have any snakes in there that was poison, that I had removed the fangs. I didn't pay much attention to them, kept talking to other people, and finally Mr. James made a remark about betting me there wasn't a poison snake in my pit, and I got sore and was going to take him up, and he bluffed out, so they walked out, I guess. I didn't notice them [fol. 417] when they went out.

Q. Did you see either of them at any time after that?

A. Yes, sir.

Q. How soon after that?

A. I think it was the following day, if I am not mistaken.

Q. Which one did you see?

A. Mr. Hope.

Q. Did you have any conversation with him at that time?

A. Yes, sir.

Q. Did you have any transaction with him?

A. Yes, sir.

Q. What was the transaction?

A. When he came in he brought——

Q. Just don't tell us about the conversation. What was the transaction?

A. I sold him a rattlesnake.

Q. And in connection with that transaction did you have some conversation?

A. Yes, sir.

Q. What was the conversation?

A. Well, when he came in he had a box about so big, and a glass top on it, sliding top. I didn't know what was

in the box when he first came in, and I thought he had a couple of rattlesnakes, and I was busy talking to some of my people, and I told him to wait a minute, and he called me, and I went over and he said, "Come outside." And [fol. 418] in this box he had a white rabbit about half grown, and he said he had made a bet with Mr. James of $50.00, that is, Mr. James had bet him $50.00 that we didn't have a poison snake in the place, and he had been playing poker with him, and had lost about $100.00, and he had a chance to get about $50.00 of it back, if I would sell him a snake and guarantee it was poison, so I sold it to him. He wanted me to put the rabbit in the box with the snake, and kill it, to show that it was poison. I said, "No, the Humane would be on my neck in a minute, but", I said, "I will sell you the snake and you can take the rabbit wherever you please and test it out, because I know it is poison." And I sold him the snake.

Q. Did you charge him for the snake?

A. I charged him $3.00.

Q. Did he pay you?

A. Yes, sir.

Q. Did you see him again thereafter?

A. Not until he came down to the place on a Sunday.

Q. This last time that you saw him, when was that?

A. Who, James or Hope?

A. Hope.

A. Mr. Hope, the last time I seen him he came down there with all the boys from the District Attorney's office. I don't know what Sunday it was now. I think it was in May some time.

[fol. 419] Q. At any rate, until he came down in May with the officers you hadn't seen him since this time?

A. Not since the transaction.

By Mr. Clark:

Q. Now, let me see, Mr. Allman, how many times altogether did you see Mr. James at your place of business?

A. Once was all I ever remember.

Q. And on that occasion you also saw Mr. Hope?

A. Yes, sir.

Q. You have been in attendance upon the court here for some days, have you not?

A. Yes, sir.

Q. You heard the testimony of Mr. Hope upon the witness stand, didn't you?

A. Yes, sir.

Q. You, yourself, testified before the Grand Jury in regard to this matter upon the 6th day of May, did you not?

A. Yes, sir.

Q. And at that time the facts were fresh in your recollection?

A. Yes, sir.

Q. May I be pardoned to come around and stand by you so that you and I may look at this transcript together? I will ask you if it is not a fact that in testifying before the [fol. 420] Grand Jury you testified as follows—I direct your attention, Gentlemen, to the Grand Jury transcript, at page 42, to get the connection, at line 23: "Q.—And did they have any conversation with you? A.—Yes, sir. I was playing with the rattlesnakes, as I generally will do, making them strike, and working around pretty close to them, and they got an idea the way a lot of people figure those snakes are harmless, but we don't remove any fangs from our rattlesnakes, and I told them that. Well, one guy—Mr. Hope—he was the one that was a little bit, wanted to argue about it. He says, 'Those snakes are not poisonous.' I said, 'Certainly they are poisonous.' 'Well,' he says, 'do you want to bet $20.00 on it?', something like that. I said, 'Sure, I will cover the bet.' "

Didn't you so testify before the Grand Jury, Mr. Allman?

A. Yes, I did.

Q. Now, I will ask you, Mr. Allman, if you didn't see Mr. James at your place of business upon some later occasion than that, of the conversation we have just read, some of the officers being present?

A. Yes, sir.

Q. Some conversation occurred between you, Mr. James and the officers there on that occasion, did there not?

A. Yes, sir.

[fols. 421-427] Q. Do you know the names of those officers?

A. No, I don't.

Q. Neither do I, so I can't name them to you. You were asked by somebody whether or not you could identify Mr. James, weren't you?

A. Yes, sir.

Q. And you were asked whether you could identify Mr. Hope, weren't you?

A. Yes, sir.

Q. Mr. Hope was there also, wasn't he?

A. Yes, sir.

Q. And it is a fact, is it not, that you said to those parties there that you could identify Mr. Hope, but you weren't sure of Mr. James?

A. Yes, sir.

Q. You say you didn't say that?

A. I did.

Q. Pardon me. That is all.

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[fol. 428] Irving Sherman, called as a witness in behalf of the People, being first duly sworn, testified as follows:

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Direct examination.

By Mr. Williams:

Q. Mr. Sherman, what is your occupation?

A. Right now, I am not doing anything.

Mr. Barnes: Will the Court instruct the witness to tell us his father's name?

A. Mr. Marcus Sherman.

By Mr. Williams:

Q. What is his business?

A. Right now——

Q. What is his business generally?

A. He is in the cabinet business.

Q. Was he engaged in that business in Los Angeles, in 1935?

A. He was.

Q. And were you working for him at that time?

A. I came down to his place of business every afternoon.

Q. Do you know Mr. Hope, who testified today in this courtroom?

A. I do.

• • • • • • •

[fol. 429] By Mr. Williams:

Q. Did he buy two boxes which he had your father and you make for him on July 28th, 1935?

A. Yes, sir.

Q. Did he pay $5.00 for those two boxes?

A. Yes, sir.

Q. Just describe the boxes.

A. Well, the boxes were so built that—they were made of wood and I believe they had a sliding, glass top. I am not sure whether the top was made of sliding glass, but it don't make any difference. In the back and on the top and perhaps on the end, there were a few holes bored for ventilation purposes, and there was a sliding top.

Q. What was the approximate size of the box?

A. Well, the boxes were about 20 or 22 inches long and about 9 inches high and—I am not sure about the width, [fols. 430-463] and maybe 10 or 12 or 15 inches in width.

Q. That was approximately the size of this box.

A. Yes, sir.

Mr. Clark: I would like to ask whether the witness has the means of ascertaining that measurement?

The Court: Have you any record?

A. I don't believe there is any evidence.

The Court: There were no drawings or anything made?

A. No, sir.

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[fol. 464] Mr. Clark: Just one moment. I wanted to ask counsel to approach the bench.

(The following proceedings were had at the bench, out of the hearing of the jury:)

OBJECTIONS TO EXHIBITION OF SNAKES

Mr. Clark: I understand that during the course of this testimony that the District Attorney intends to bring into the courtroom two live rattlesnakes. I have no doubt but that they come from the south, and whether they are from the south, or whether they are from the north, I do not believe that the snakes are admissible in evidence, and I

feel that the bringing of the snakes into the courtroom in such a manner as is indicated will be highly prejudicial to the case, and there would be no other purpose than just to excite the passions of the jury. I hope I have made my [fol. 465] objection and my assignment of misconduct sufficiently explicit that there will be no question about it.

Mr. Williams: That was my intention, to bring the actual snakes that were at the house that day, that were bought from Mr. Houtenbrink, and returned thereafter to him.

The Court: Well, we will let the record show that as far as the rights of the defendant are concerned, that this Court will assume, and it will be assumed that having knowledge concerning the procedure contemplated by the District Attorney, and that it is not a form of assignment of misconduct, but merely in the nature of objection, and that if the objection be sustained, the Court will expect defense counsel to expect that the jury be instructed, and that if the objection be overruled, the order overruling the objection will be for the purpose of this record also denying the request for the instruction, so an instruction will not be necessary, and it is implied by the overruling of the objection by the Court.

Mr. Clark: As I understand, your Honor expects us to make an objection.

The Court: Yes, the objection can be considered as made. You may proceed with the examination.

* * * * * * *

[fol. 466] Joe Houtenbrink, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Joe Houtenbrink.

Direct examination.

By Mr. Williams:

Q. Mr. Houtenbrink, you are the fellow commonly referred to as "Snake Joe", are you?

A. Yes, sir.

Q. What is your occupation?

A. Well, I operate a snake farm.

Q. Where is your snake farm located?

A. It is at 2671 West Valley Boulevard.

Q. And where was your snake farm in the month of July, 1935?

A. At 42 Cypress Street, east Pasadena.

Q. Did you at that time own a number of rattlesnakes?

A. Yes, sir.

Q. And do you know Charles Hope who testified on Thursday and Friday as a witness in this case?

A. Yes, sir.

Q. When and where did you first see him?

Mr. Clark: Just one moment. At this time the question now pending, I think, applies to the line of examination that we discussed being made. At this time we object to [fol. 467] any testimony of any conversation that Mr. Hope had with Mr. Houtenbrink, on the ground that it was outside of the defendant's presence, and on the ground that such matters are irrelevant, and no foundation has been laid for the introduction of the same.

The Court: Barring such specific questions as are applicable under the line of the examination indicated, along that line, the objection is overruled.

Mr. Clark: Then it will not be necessary for me to make further objections unless there is some specific reason develops?

The Court: Unless it is specifically objected to, why, the objection is overruled. Counsel has in his mind what I have stated. On the general subject matter it might be generally hearsay, and the conversation might be objectionable on some other ground. However, the general objection at this time is overruled.

By Mr. Williams:

Q. I think the question was when and where you first met him?

A. As far as my recollection, it was on August 3rd, the way it appears in the book.

Q. 1935?

A. 1935.

Q. Where?

A. At 42 Cypress Street, Pasadena.

Q. Did you on that day have a business transaction with [fol. 468] him?

A. Yes, I sold two rattlesnakes.

[fol. 469] Q. And do you remember the kind of rattlesnakes they were?

A. Diamond-back or Crotalus Atrox.

Q. How many snakes did you sell him?

A. Two.

Q. Do you know how much you charged him for them?

The Court: Well, we have only had a description of one snake so far, Mr. Williams.

A. Yes, sir. Both of them were the same.

By Mr. Williams:

Q. Both of them the same description?

A. Yes, sir.

Q. How much did you charge for them?

A. $3.00.

Q. At the time you sold those snakes to him did you have any conversation with him?

A. Yes, sir.

Q. What was the conversation?

A. The way he told me he had a friend—and he said he already bought some snakes from other places and they wasn't hot and he wanted a real hot one and he was told to come over to me to get the snakes, that I handled hot snakes.

Mr. Clark: It is understood that I object to all the conversation?

The Court: Yes.

A. He said a friend and he had a bet on and he wanted to kill a dog and he said if it would kill a dog he would [fol. 470] collect quite a bit of money out of the bet and make up on the bet again, and he wanted to get real hot snakes.

Q. Now, when he got the snakes, did he have anything to put the snakes in?

A. Yes, a glass bottom box.

Q. And did he take them away with him?

A. Yes, sir.

Q. Did you see him again?

A. Yes sir, on August 4th.

Q. About what time?

A. Oh, I should say it was around between 2:00 and 3:00 o'clock, as far as I could judge.

Q. In the afternoon?

A. In the afternoon, yes sir.

Q. Did you, at that time, have a transaction with him?

A. Yes, I rebought the snakes from him. He said the Humane Society stopped him from having the fight.

The Court: Just a moment. I will entertain a motion to strike the conversation.

Mr. Parsons: Move to strike it.

The Court: The last statement attributed to Mr. Hope is stricken out and the jury are instructed to disregard it.

By Mr. Clark:

Q. How much did you pay for the snakes when you took them back?

A. $1.50, half of the original purchase price.

Q. Do you still have those snakes?

[fol. 471] A. Yes, sir.

Q. The identical snakes that you sold him?

A. Yes, sir.

Q. Are they in here in the court room?

A. If I can see them I will tell you if they are here, yes sir.

Mr. Williams: Will you produce that box?

Mr. Clark: If the Court please, I object to the witness leaving the stand for the purpose of looking at the box that has been brought into the courtroom, or for any other purpose. I object to any snakes being exhibited or introduced into this case. I think this is an appropriate time for me to ask your Honor either by statement of your Honor or some appropriate means to make it appear in the record that two men have just entered the courtroom carrying a box covered with a burlap cloth, and upon their coming down the aisle, the people who were in the courtroom, filling the courtroom, manifested excitement, that several of them rose from their seats, that the attention of spectators and the jury were directed away from the testimony of the witness that at the time I am speaking there is upon the faces of the audience an appearance of anxiety and consternation not heretofore exhibited during this trial.

The Court: The Court has no knowledge that there was

any such manifestation on the part of the audience. The Court is unable to state whether the attention of any per- [fol. 472] son was diverted or not, nor is there anything to indicate the apprehension that your statement implies; at least, it has not been seen by the Court.

Mr. Clark: In other words, your Honor has no knowledge that the statement I have just made is correct?

The Court: No. That may be your frank, honest opinion as to the facts, however, the Court has not seen any such situation.

Mr. Clark: I will try to find appropriate means of putting those facts in evidence. I think that they are facts and that my statement is appropriately made at this time.

The Court: So far as the physical facts of the two men having taken the box in from the courtroom door and passed up the aisle between the two groups of spectators, through the gate into the inner part of the courtroom and deposited the box by the side of the bench, the record may show that that did occur.

Mr. Williams:

Q. Now, Mr. Houtenbrink, will you step down and examine the box?

Mr. Clark: To which we object.

The Court: The objection to Mr. Houtenbrink stepping down to examine the box is overruled.

Mr. Clark: No objection if I step over here with you, is there?

A. No.

By Mr. Williams:

Q. Now, Mr. Houtenbrink, you may resume the stand. [fol. 473] Did you recognize the object or objects which you saw in the box that you just examined?

A. Yes, sir.

Mr. Clark: That is objected to upon the ground that the evidence is incompetent, irrelevant and immaterial.

The Court: Overruled.

By Mr. Williams:

Q. What were the objects?

Mr. Clark: Same objection.

A. Two rattlesnakes.

The Court: Overruled.

By Mr. Williams:

Q. And were those the same snakes that you sold to Mr. Hope?
A. Yes, sir.
Q. And which he then returned to you?
A. Yes, sir.
Q. As you have described in your testimony?
A. Yes, sir.

Mr. Williams: At this time, if your Honor please, we offer these rattlesnakes in evidence.
Mr. Clark: To which we object upon the ground——
The Court: They will be marked for identification, Exhibit 20.
Mr. Williams: For identification only, your Honor?
The Court: Yes, at this time.
Mr. Williams: You may cross-examine.
Mr. Clark: I move to strike out all of the evidence of the [fol. 474] witness upon the ground that all of the testimony given by him is irrelevant to all of the issues in this case, that it relates to transactions occurring outside of the presence of the defendant, not relating to the crime charged here and that no foundation has been laid for the introduction of such testimony.
The Court: The objection will be overruled.

Cross-examination.

By Mr. Clark:

Q. Will you oblige me by standing up a moment, Mr. James?
(Defendant stands in courtroom.)

Q. This is not the gentleman whom you speak of as Mr. Hope, is it?
A. No, sir.

Mr. Clark: Sit down, Mr. James.
(Defendant does as directed.)

Q. Do you recognize this gentleman as anyone you ever saw before?

A. I have never seen the gentleman before in my life.

Q. You have no knowledge that he ever saw those snakes or either of them, have you?

Mr. Williams: Objected to as calling for a conclusion of the witness.

The Court: Objection sustained.

By Mr. Clark:

Q. So far as your knowledge goes, those rattlesnakes were never in his possession at all, were they?

[fol. 475] Mr. Williams: Objected to as not proper cross-examination.

The Court: Objection sustained.

By Mr. Clark:

Q. You don't know what Mr. Hope bought the snakes for other than what Mr. Hope told you, do you?

Mr. Williams: Objected to as calling for a conclusion of the witness.

The Court: Overruled. Read the question to the witness.

(Question read by the reporter.)

A. No.

By Mr. Clark:

Q. And when was it that you sold Mr. Hope the snakes?

A. I have it in my book as I said just a minute ago, on August 3rd.

Q. You made a memorandum at the time, did you, of the transaction?

A. I made a memorandum of every day's transactions.

Q. Now, when was it that you received the snakes back from Mr. Hope?

A. On August 4th on Sunday. I know very well it was Sunday, because my mother-in-law happened to be there.

Q. What time of day Sunday was it?

A. I should say between 2:00 and 3:00 o'clock.

Q. In the afternoon, you mean?

A. In the afternoon, yes sir.

Q. When Mr. Hope came to your place on August 3rd,

you didn't recognize him as anyone you had ever seen [fol. 476] before, did you?

A. I never seen the man before in my life.

Q. There was nothing about his manner or demeanor at that time that you particularly noticed, was there?

A. No sir, just like any other show man.

Q. He didn't appear to you at that time to be intoxicated, did he?

A. No. I drink myself. I won't say what intoxication is. Just one or two drinks isn't, in my estimation, intoxication.

Q. He hadn't been drinking so that it was noticeable to you?

A. No, sir.

Q. When he returned the snakes was his manner, as nearly as you could tell, the same as when you saw him before?

A. Yes. He had a couple of drinks, is the way it looks, but he wasn't intoxicated. We had some drinks ourselves, I remember, went out and had a glass of beer together.

Q. These snakes, when Mr. Hope came there did he bring any receptacle to put the snakes in?

A. Yes, sir.

Q. What kind of a receptacle did he bring?

A. A wood box with a glass bottom.

Q. Is that the same box that you were looking at a moment ago?

A. No, sir.

[fol. 477] Q. Where did you get the box that was brought into court?

A. It belongs to the State of California.

Q. In other words, that box was furnished you by the prosecution in this case, wasn't it?

A. To put them in, yes sir.

Q. Are they paying you for your testimony here?

A. No, sir.

Q. Haven't they paid you for any advice in connection with this case?

A. No, sir.

Q. Do you expect to receive anything for being here?

A. I don't expect so. I am pretty well broke myself, but then you know——

Q. You have some hopes?

A. I suppose I get $1.75; it is up to the Court, which I appreciate. I am losing every day.

Q. How much do you say you expect to get?

A. $1.75. Is that right?

Q. When Mr. Hope brought the snakes back, did he bring them back in the same box that he put them in in the first place?

A. Yes, sir.

Q. And did he leave that box with you or take it away with him?

A. No sir, he took it away with him.

[fols. 478-479] Q. When he took it away, so far as you know, it was empty, I suppose?

A. Yes, it was empty.

Q. And the snakes, when he brought them back, were in about the same condition so far as you could see, as when they went out of your place?

A. Yes, good condition.

* * * * * * *

[fol. 480] Joe Houtenbrink, resumed the stand and testified as follows:

Cross-examination (Continued).

By Mr. Parsons:

Q. Mr. Houtenbrink, as I understand, you have been in the snake business, and you operate a concern where you have in your possession various kinds of snakes, have you not?

A. Yes, sir.

Q. And you have done so for a great number of years?

A. About five years ago is when I started in.

Q. And during that time, have you observed the habits of various snakes?

A. You asked me how long I had been handling snakes. I have been handling snakes ever since I was a little kid.

Q. You have been in that business for 10 or 15 years?

A. Yes, sir.

Q. And observed snakes while in their native habitat?

[fol. 481] A. Yes, sir.

Q. And you have observed their conduct, have you?

A. So far as I could, yes sir.

Q. And the snakes of the type that are here strike very rapidly, do they not?

A. In what respect?

Q. How is that?

A. In what respect?

Q. May I have that answer read?

(Answer read by the reporter.)

Q. When a snake of the type that is seen here observes a person or a shadow approach them, they strike very rapidly, do they not?

A. This particular kind, yes. They are very mean.

Q. That is a Western Black-Diamond, is it not?

A. No.

Q. What type is it?

A. It is a Western Diamond rattlesnake.

Q. This particular snake as I understand your testimony does strike very rapidly?

A. Correct.

Q. And is it a habit of this particular type of snake to make some observation of an approaching object before it strikes?

A. Well, any kind of a snake, regardless of poisonous or non-poisonous would have that kind of a habit, to make an [fol. 482] observation to see.

Q. They always make some observation, do they not?

A. Certainly.

Q. They don't just arbitrarily strike?

A. No, they have to have something to strike at to be able to strike.

Q. And before striking they make some investigation, to put it simply, is that right?

Mr. Williams: I object to that as calling for a conclusion of the witness.

The Court: It will be sustained. It seems to me it is not proper cross-examination. This witness merely testified to a transaction, and was not qualified as an expert.

Mr. Parsons: That may be a good objection. Will you describe to us the size, as near as you can, Mr. Houtenbrink, the size and dimensions of the box which you state this man whom you sold these snakes to had at the time he called for them?

A. Oh, I should say——

Q. I will get a ruler for you, that perhaps will assist you?

A. That would be the best.

Q. Now, this ruler is 15 inches long, and if you will just mark it here on the space in front of you approximately the length.

A. Oh, well, I would think it was about that long.

Q. From the end——

[fol. 483] A. Yes, to about there.

Q. Will you hold that and I will measure?

A. I would say 18 inches; that would be close enough.

Q. About 18 inches, and how wide was this box?

A. Well, I would say about 12, 11 or 12 inches, somewhere around there.

Q. 11 or 12 inches wide, and how tall was the box?

A. About that tall.

Q. About the same height?

A. Yes.

Q. And was the box wood on three sides, and one side glass?

A. It was wood on five sides and one side glass. That makes a box.

Q. There was only glass on one side, is that right?

A. The top, but you could make it the side if you turned the box over.

Q. Did that glass slip up and down?

A. It slides.

Q. Slid in a track, did it?

A. Yes.

Q. Was there any other opening in the box besides that by moving the glass?

A. Yes sir, there was a hole in the end, if I remember right, for ventilation.

Q. How large was that hole?

[fol. 484] A. I didn't measure it, but I would say about 2 inches.

Q. Was that a square hole, or circular?

A. A round hole.

Q. A round hole; and did it have some covering over it like wire?

A. A screen wire.

Q. And do you recall the color of the box? Was it just in the natural finish?

A. Just a plain wood box in my estimation. Now, as far

as I remember, I didn't look it over closely, you know. There are lots of boxes come in there.

Q. Could you move the glass the entire length of the box in opening it, or did you observe that?

A. I didn't observe that. I believe you could, though.

Q. Did you open up the box in putting the snakes in it?

A. Yes.

Q. How far did you open it?

A. I should judge half way.

Q. That would be about 9 or 10 inches?

A. Yes, that would be about right, maybe a little bit more; I couldn't tell you exactly about that.

[fol. 485] Q. Now, this box that the man returned these snakes in——

A. The same box.

Q. —was the same box?

A. Yes, sir.

Q. Now, in opening the box you slide the glass back 8 or 10 inches, is that right?

A. Well, to my estimation, yes.

Q. So that is about half the length of the length of the snake that you slide the glass back in putting the snakes in?

A. A little over half the length.

Mr. Parsons: That is all.

Mr. Williams: Just a moment. Now, at this time, if your Honor please, we offer in evidence People's Exhibit 20 for identification.

Mr. Parsons: The same objection, your Honor.

The Court: The objection is overruled. It will be received as 20 in evidence.

Mr. Williams: May I have those snakes put up here for the inspection of the jury?

Mr. Parsons: The same objection.

The Court: Objection overruled.

Mr. Parsons: May it be understood, when I refer to that objection, that it was an objection made by Mr. Clark?

The Court: It doesn't make any difference. I have given you the same position as cross-examiner as Mr. Clark.

[fol. 486] Redirect examination.

By Mr. Williams:

Q. Now, I observe something here in this box other than the two snakes. Will you explain what that is?

A. Well, this happened about five days ago, I should say. I believe that both snakes crawled out of their skin.

Q. In other words, they shed their skin, and the dead skin is lying in there?

A. Yes. The box had not been opened up, and I just left it the way it was.

Mr. Williams: Can you see those snakes all right? That is all. I have no further questions.

Mr. Parsons: No further questions. I would like to say that we may want to bring Mr. Houtenbrink in, if we can have his telephone number so that we can get in touch with him.

The Court: Well, you can make the same arrangements that you did with the other witness, I am satisfied.

Mr. Williams: I will call Mr. Houtenbrink, then.

Mr. Parsons: Is it necessary to keep the snakes here?

The Court: No, I don't think so.

Mr. Williams: They can remove the snakes.

The Court: Yes, I think so.

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[fols. 487-489] Miss Lois Wright, called as a witness in behalf of the People, being first duly sworn, testified as follows:

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Direct examination.

By Mr. Williams:

Q. Miss Wright, do you know, or did you ever know the defendant, Robert James?

A. Yes, sir.

Q. And did you bear any relationship to him?

A. Yes.

Q. What was it?

A. I am his niece.

Q. During the early part of the year 1935 were you living with him in Los Angeles?

A. Yes, sir.

• • • • • • •

[fol. 490] Mr. Williams: Miss Wright, do you know Charles Hope who was on the witness stand here?

A. Yes, sir.

Q. And when and where did you first meet him?

A. I think the first time I met him was at my uncle's house one Sunday. My aunt was there.

Q. When?

A. Well, it was either June or July; I suppose it was July of last year.

Q. Of 1935?

A. Of 1935.

Q. And during that period of time were you working at your uncle's barber shop?

A. Yes, sir.

Q. And were you there daily?

A. Yes, sir.

Q. And now, did you see Mr. Hope, at your uncle's barber shop?

[fol. 491] A. Yes, sir.

Q. And did you see him more than once?

A. Yes, sir.

Q. Just state what he was doing when he was there?

A. Well, sometimes he would come in and get barber work and other times he wouldn't. He would come in and talk to my uncle.

Q. Where were he and your uncle when they talked together?

A. They would either sit in the waiting chairs and talk or they would walk outside of the barber shop and around the corner.

Q. Did you see them go outside of the barber shop conversing with each other more than once?

A. Well, I think so, maybe a couple of times.

Q. When was that, with reference to the first time that you saw Hope at your uncle's house?

A. Well, it must have been very soon after that.

Mr. Parsons: Move to strike out "It must have been."

The Court: Motion denied.

A. I don't know just whether it was a week or two weeks, but I know it was very shortly after that, after I had met him up at the house on Sunday, that Sunday.

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[fol. 492] SAM GRANT, called as a witness in behalf of the people, being first duly sworn, testified as follows:

* * * * * * *

Direct examination.

By Mr. Williams:

Q. What is your occupation, Mr. Grant?

[fol. 493] A. Barber.

Q. And do you know the defendant, James?

A. Yes, sir.

Q. How long have you known him?

A. I have known him since 1927.

Q. And do you know Charles H. Hope who testified in this case?

A. Yes, sir.

Q. How long have you known him?

A. Since 1928.

Q. During the year 1935, where were you engaged in business?

A. 522 West 8th Street.

Q. Is that the same shop that was owned by the defendant, James?

A. Yes, sir.

Q. How large a shop was that?

A. Well, it is three chairs and a beauty stall.

Q. And did you, during the year 1935, see Mr. Hope at the defendant's place of business?

A. Yes, sir.

Q. How many times did you see him?

A. Well, I couldn't say how many times, but several times. He was a regular customer.

Q. And now, do you remember the occasion of the death of Mary James?

[fol. 494] A. Yes, sir.

Q. With reference to that, when did you see Mr. Hope at the defendant's place of business?

A. Do you mean prior to that time?

Q. Well, did you see him there prior to that time?

A. Yes, sir.

Q. How many times?

A. Several times.

Q. Did you see the defendant and Mr. Hope together?

A. Yes, sir.

Q. What were they doing?

A. They were in the shop and he just came in to get his work.

Q. Did you see them engaged in conversation?

A. Oh, a casual conversation, I would say.

Q. Did you ever see them go out of the shop together engaged in conversation?

A. I seen them stand in front of the shop on one occasion and talk for a little while.

Q. Now, after the death of Mary James did you see Hope there again?

A. Yes, sir.

Q. How often?

A. Well, I wouldn't say for sure, but I would judge about every three weeks, something like that.

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[fol. 495] Cross-examination.

By Mr. Parsons:

Q. Now, you have seen Mr. James stand in front of the shop and talk with other customers too, have you not?

A. Yes, sir.

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[fol. 496] Louis Berry, called as a witness in behalf of the People, being first duly sworn, testified as follows:

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Direct examination.

By Mr. Barnes:

Q. What is your business, Mr. Berry?

A. I am a life insurance agent.

Q. Connected with what concern?

A. Mutual Life Insurance Company of New York.

Q. How long have you been connected with that concern?

A. Three years.

Q. Do you know the defendant, Mr. Robert L. James who sits in the courtroom here?

A. I do.

Q. Did you see him in the year 1935?

A. I did.

Q. Are you familiar with the place where his barber shop was located at 522 West 8th Street in this city?

A. Yes, sir.

Q. How did you become acquainted with Mr. James?

A. By having my work done, my barber work done.

Q. He was your barber?

A. Yes, sir.

Q. Did you ever have any conversation in the year 1935 [fol. 497] with him with respect to the matter of insurance?

A. Yes, sir.

Q. Approximately when was it?

A. Well, during the entire year for that matter I had been soliciting him for life insurance ever since I had been going into his shop.

Q. Calling your attention now to the year 1935 in particular did you have a conversation with him with respect to the subject matter of any prospects that he might have for you?

A. Yes.

Q. About when was that, Mr. Berry?

A. Along in April of 1935.

Q. What was that conversation, the first one that you now refer to?

A. In soliciting him for insurance, he told me that personally he would not be interested, but he would recommend somebody as he had done in the past. He said he knew of some certain girl that would be interested in taking some life insurance.

By Mr. Barnes:

Q. Did you ask who it was at that time?

A. I did.

Q. And what reply did you receive?

[fol. 498] A. Well, he was not prepared to tell me who it was, until the prospect was ready.

Q. Is that what he said?

A. Yes.

Q. When was the next conversation with him about that subject?

A. Approximately two weeks afterward.

Q. At the barber shop again?

A. Yes, sir, always at the barber shop.

Q. What did you say, and what did he say?

A. He wanted to know about how much this would cost for having a $5,000.00 insurance policy on the 20-year, or 25-year endowment plan, on a girl about 26 years of age.

Q. I call your attention, Mr. Berry, to a document here that you have kindly furnished to us before. Does that document--was that document prepared by you?

A. Yes, sir.

Q. Now, at some time after these events had taken place, during the year 1935, did he make a memorandum and brief sketch of the conditions?

A. Yes, I did.

Q. At the time you made that were certain dates fresh in your memory?

A. Yes, sir.

Q. And would that assist you in fixing the dates and the sequence of events, to use that memorandum?

[fol. 499] A. Yes, sir.

Q. Can you tell us what conversation you next had, after the incident that you have just related with the defendant?

A. I submitted the proposition on a 25-year policy for $5,000.00 worth of insurance.

Q. And at the time you submitted that, had you been told the name of the party to be insured?

A. No, sir.

Q. You submitted it to the defendant?

A. I submitted it to Mr. James, who promised to submit it to the prospective policy holder.

Q. And that was the substance of that conversation?

A. Yes.

Q. When did you next have a conversation?

A. About a week later.

Q. Where?

A. At the barber shop. I asked Mr. James if he was then prepared to give me the name of the prospect, and he said that he was.

Q. What name did he give you?

A. He didn't give me a name, but he called a young lady from the rear of his barber shop, and introduced her to me.

Q. And who was the young lady?

A. That was Mary E. Busch, later Mrs. Robert James.

Q. Then did the three of you have conversation about insurance?

[fol. 500] A. No. No, he introduced me to her, and I sug-

gested to her that we go away from the shop to talk over the insurance.

Q. Thereafter you and she went away from the shop?

A. Yes, she and I went away from the shop to talk about the matter.

Q. Did you ever take an application for insurance from Mary E. James, nee Busch?

A. I did.

Q. When?

A. On the 7th of May.

Q. I call your attention to a document heretofore shown to counsel, and ask you if you recognize it?

A. Yes, sir.

Q. What is it?

A. This is an application for a $5,000.00 insurance policy in the Mutual Life Insurance Company of New York.

Q. Now, that is the application that was finally made by Mary Busch for insurance in that concern?

A. Yes, sir.

Q And what was the day you obtained that?

A. May 7th, 1935.

Q. What kind of policy is applied for in that application?

A. That is $5,000.00, three year term, followed automatically by life.

Q. Did you have any conversation with the defendant, [fol. 501] James, prior to getting that application from Mary Busch, with respect to any other company's insurance, or the prices of their insurance?

A. Yes. About a week before this application came in, Mr. James told me that the proposition I submitted was higher in price than a certain competitor offered.

Q. Did he mention the competitor?

A. Yes, sir.

Q. What?

A. The Prudential Life Insurance Company is what he termed a half priced policy, meaning that the first three years it would cost less, and a little less later. I sent for them. We called it a preliminary form, and then change it afterwards. He wanted to know what the price of that would be, and I submitted that price, and a week later was when I went ahead with the examination.

Q. And that was the insurance, apparently, that was issued on Mary James?

A. Yes, sir.

Q. Now, after receiving the application from Mary James, what did you do?

A. I took her up to the Doctor's office, and had her examined to see whether she could pass an examination for that insurance.

Q. And you subsequently heard from the examination?

A. Yes. The examination went into New York, and the [fol. 502] company wrote back that they had—they wanted additional information as to the party's history, as to the past history of Mary James, her residence, and so forth, for the last three years.

Q. Thereafter did you have any conversation, prior to the actual delivery of the policy, with Mr. James, about the policy on Mary Busch?

A. When I called for additional information Miss Busch told me, after giving me the information——

Mr. Parsons: Just a minute, now; that is hearsay.

The Court: I think so.

Mr. Barnes: I believe that is hearsay, your Honor.

A. Pardon me.

Q. Mr. James was there, or wasn't there?

A. He said——

Q. Well, you cannot tell us that conversation.

The Court: Was that ever put in the form of an affidavit?

A. Yes, sir.

Q. Did Mr. James ever see it?

A. I don't know.

The Court: Proceed.

By Mr. Barnes:

Q. At any rate, you had a conference with Mary Busch, and then what did you do after the conference?

A. I reported to him——

Q. Don't tell us what you reported.

[fol. 503] A. I reported to my company.

Q. Did you thereafter deliver any policy of insurance to Mary James?

A. On the 25th of June, I delivered a policy such as was applied for, namely, a $5,000.00, three-year premium term, for $5,000.00

Q. I call your attention to—by the way——

Mr. Parsons: Mark the application.

Mr. Barnes: May I have the application marked for identification?

The Court: 21 for identification, and the other document which you are about to show the witness, mark that 22.

Mr. Barnes: Thank you.

Q. Showing you People's Exhibit No. 22 for identification, please examine it.

A. Yes, sir.

Q. Is that the policy that was delivered to Mary James?

A. Yes, sir.

Q. Where was the delivery made?

A. At the same barber shop where I had originally met Mary James.

Q. Whereabouts was that?

A. At 582 West 8th Street.

Q. Was Mr. James present at that time?

A. Yes, sir.

Q. Was there any conversation at that time with the [fol. 504] defendant about it, or in his presence?

A. No, sir.

Q. Did you have any further discussion with the defendant about the subject matter of the policy, People's Exhibit 22, that you now hold in your hand?

A. Yes, on the 29th of July.

Q. About what?

A. I received a telephone call at my office from Mr. James. I was not in my office, and the message was left for me to get in touch with him as soon as I came in. It was after this conversation, and before the message—well, the message didn't come, and I was to see him the following morning. When I called him on the following morning, he said to me, "Does it make any difference in a life insurance policy if an applicant states that she is married, and she really is not married?"

[fol. 505] Q. Well, what did you say?

A. Well, I said, "Just what do you mean by that?" "Well," he said, "Mary stated that she was married at the time she applied for your policy. She really was not mar-

ried until the 19th of July. Now, would your company have any objection to that?" So, I said I didn't know, but I would submit the question to the company, and asked Mr. James if he had the marriage certificate and the policy, which I promised to forward to my office for an answer to that question.

Q. What did he say when you asked him if he had the marriage certificate and the policy?

A. He had the marriage certificate in the pocket of his coat, hung up, and he brought it to me with the policy and I gave him a receipt for it.

Q. Is the policy that he gave you at that time this document marked People's 22 for identification?

A. Yes, this is the policy. I took the policy to my office, together with the marriage certificate, and turned it over to our assistant manager.

Q. Thereafter, did you see the policy and the marriage certificate again?

A. On the 5th day of August the policy was returned to me with instructions to deliver to the insured.

Q. And the marriage certificate likewise?

A. The marriage certificate was with it, with a letter.

Q. Now, don't tell us what was in the letter. The letter [fol. 506] was an inter-office communication, I take it?

A. That is right.

Q. In any event, you took the policy and the marriage certificate, and what did you do with them?

A. And I delivered it to the barber shop, Mr. James, to Mr. James personally, because Mrs. James was not there. At that time I inquired about Mrs. James' health and Mr. James informed me that she was getting along nicely.

Q. Had you had any previous conversations with Mr. James with respect to the health of Mrs. James?

Mr. Parsons: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. In the three weeks prior to the 5th day of August I made weekly visits to the barber shop to have work done and each time I would inquire how Mrs. James was getting along, and Mr. James invariably told me that she was doing nicely.

Q. When was it, if you can recall approximately, that you

first had a conversation with Mr. James with respect to whether or not Mrs. James was well or ill?

A. It was sometime early in July.

Q. What was said upon that occasion?

A. When I called to the shop I inquired about Mrs. James, who was not present, and was told that she was home, ill.

Mr. Parsons: With whom was this conversation?

[fol. 507] A. With Mr. James.

Mr. Barnes: Did you have any discussion at that time with reference to the subject matter of insurance in some other company?

A. No, sir.

Q. Did you, at any time between that time and the 5th day of August, have any conversation with Mr. James on that subject matter?

A. Just prior to the 5th of August visit, I dropped into the shop to have some work done and I asked Mr. James how Mrs. James was getting along. He said she was get ting along nicely, but there was no hurry about her coming home, because she had a health insurance policy and as long as that paid for her time, she was going to get perfectly well before she got back to work.

Mr. Silverman: By "coming home", you mean to the shop, don't you? Instead of "coming home", you meant the shop?

A. Coming to the shop, yes, pardon me.

By Mr. Barnes:

Q. About how long was that before the 5th of August, approximately?

A. Approximately a week.

Q. Did you have any conversation with Mr. James after you learned of the death of Mrs. James about this insurance?

A. About this insurance?

Q. Yes.

A. Yes, I had several conversations with him.

[fol. 508] Q. About when?

A. The first conversation was about between the 15th and 20th of August, I would say, when he first returned to the barber shop. He was absent there for quite a few days after Mrs. James' death.

Q. What was the subject matter of that conversation, what was it about?

A. His question invariably would be whether the company would pay double indemnity as the result of her dying in an accidental manner.

Q. Was anything said to him by you or by you to him with respect to the manner in which she did die?

A. I——

Mr. Clark: That can be answered "yes" or "no", if your Honor please.

The Court: Yes, answer that question "yes" or "no." Will you please read it, Mr. Reporter?

(Question read by the reporter.)

A. Yes.

By Mr. Barnes:

Q. What was it?

• • • • • • •

[fol. 509] A. The question was whether the company would allow double indemnity or twice the amount of the policy on the finding of the Coroner's Jury that it was an accidental death, and I said at the time that I didn't know, that it did depend a great deal on certain findings of the company's investigators.

By Mr. Barnes:

Q. Going back for a moment to the time when this insurance was applied for and drawing your particular attention to Exhibit 21, was anything said by Mr. James or in his presence by you or Mary Busch, with respect to double indemnity?

The Witness: Will you read that, please?

(Question read by the reporter.)

A. No.

Q. How much money was paid on that policy, People's offer 22?

• • • • • • •

A. $59.10, which was the first annual premium of the $5,000.00 of insurance, plus the double indemnity charge.

[fol. 510] By Mr. Barnes:

Q. There was only one premium paid then on the policy?
A. One premium paid.

• • • • • • •

[fol. 511] Cross-examination.

By Mr. Silverman:

Q. You have lived in this city for a number of years, haven't you?
A. 11 years.
Q. You are a married man with a family?
A. Yes, sir.
Q. And you have known Mr. James and you have had your barber work done in his shop for a number of years?
A. Almost from the first week I arrived in this city.
Q. And during that time you were soliciting or were in the business of writing insurance, weren't you?
A. Part of that time.
Q. And during that time did Mr. James give you any prospects for insurance?
A. Yes, sir.
Q. Numerous times?
A. Yes, sir.
Q. And Mr. Berry, you, I believe, stated you were acquainted with Mary James, deceased, the wife of the defendant?
A. Yes, sir.
[fol. 512] Q. When did you first meet her?
A. When he introduced me to her on or about the 7th of May.
Q. That was before anything was said about insurance?
A. Yes, sir.
Q. And you met her before anything——
A. Pardon me just a minute. That was before there was anything said to her about insurance, yes.
Q. Had Mr. James said anything to you about insurance then?
A. Oh, yes.
Q. But you hadn't actually met her and seen her in the place of business there before that time, had you?
A. No, sir.

Q. She had been there, but you hadn't seen her?

A. I may have seen her, but I didn't pay any attention.

Q. Now, this policy, People's 22 for identification was the same kind of a policy that you originally intended to write for her, isn't that right?

A. Yes, sir.

Q. And when Mr. James introduced you to Mrs. James as being the prospective person that wanted insurance, you talked to her about insurance, didn't you?

A. Yes, sir.

Q. Did you talk to Mr. James about it?

A. After that?

[fol. 513] Q. Yes.

A. No, sir.

Q. Then, did you talk to Mrs. James about insurance during her presence, while she was present? At any time while Mrs. James was present did you ever talk to her while Mr. James was present, did you ever talk to her about insurance?

A. After the application?

Q. Yes.

A. Yes.

Q. While he was present?

A. Yes.

Q. What was the subject of the conversation at that time?

A. At one time——

Mr. Barnes: May I inquire, your Honor, if this was while the defendant was present or in the absence of the defendant.

Mr. Silverman: While Mr. James was present.

A. Yes, at one time he was in the shop when she was talking to me.

Q. Was it within his hearing?

A. I think so.

Q. And what was said?

A. Mrs. James wanted to know why the policy had as yet not been issued. That was probably two weeks after the application had been sent in and I told her that I didn't know, that the company had certain rules and regulations [fol. 514] which they followed out before issuing a policy.

Q. And then you received a notice from the company after that, didn't you?

A. Yes, sir.

Q. Asking you for further information?
A. Right.
Q. Which you submitted to them?
A. Yes, sir.
Q. And this $59.10, you say was the annual premium?
A. Yes, sir.
Q. Who paid that?
A. Mrs. James did.
Q. Now, you said something with reference to the marriage of Mr. and Mrs. James. While you were in the store shortly after the application or prior to the application, shortly before the application was made did you understand, or did Mrs. James tell you that they were married?
A. Prior to the application?
Q. Yes.
A. No, sir.
Q. Before the application was made?
A. No, sir.
Q. How soon after the application was made.
A. Oh, fully two weeks after.
Q. After the application was made?
A. Yes, sir.

[fol. 515] The Court: Just one question, so we won't ramble around.

Q. The application blank contained the statement upon the blank, whether the applicant was married, did it not?
A. Yes.

By Mr. Silverman:

Q. You purchased the wedding ring for Mr. and Mrs. James?

Mr. Barnes: Object to that on the ground it is incompetent, irrelevant and immaterial and not proper cross-examination.

The Court: I don't think it is material. However, if counsel wants to ask just the one question, I will permit it to be answered.

By Mr. Silverman:

Q. Didn't you?
A. Yes, sir.

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[fols. 516-517] Q. Previous to that, when you first took the application, her estate was made the beneficiary?

A. Her estate was made the beneficiary.

• • • • • • •

[fol. 518] MAX GALATZ, recalled as a witness in behalf of the People, having been previously sworn testified as follows:

• • • • • • •

Direct examination.

By Mr. Barnes:

Q. What is your business, Mr. Galatz?

A. Life insurance representative.

Q. And were you so engaged in that business in the year 1935?

A. Yes, sir.

Q. By what company?

A. Occidental Life of Los Angeles.

Q. Do you know the defendant, Robert S. James?

A. I do.

Q. And did you know the deceased, Mary E. Busch?

A. I did.

Q. I call your attention to a document that has been shown to counsel, and ask you if you recognize that? Just have a look at it, Mr. Galatz.

A. Yes, I do.

Mr. Barnes: May we have that document marked 23 for identification?

The Court: It will be marked 23 for identification.

[fol. 519] By Mr. Barnes:

Q. I call your attention now to another document. I will ask you if you recognize that?

A. Yes, I do.

Mr. Barnes: May we have that document marked 24 for identification, your Honor?

Mr. Clark: What is it?

Mr. Barnes: Each is an application, one for $700.00, and the other for $5,000.00.

M Clark: May I see those, Mr. Barnes?

Mr. Barnes: Yes. I have shown them to your associate. (Handing documents to Mr. Clark.)

Mr. Clark: This is all that I wanted to see them for at this time, Mr. Barnes. Thank you. I will examine them more carefully later.

By Mr. Barnes:

Q. Tell us when you obtained those two applications, People's offer 23 and 24 for identification?

A. Some time the latter part of May.

Q. Is there a date on the application that would help you refresh your memory?

A. The application is dated June 3rd.

Q. Does that help you remember when it was?

A. Not exactly, Mr. Barnes.

Q. It was about that time somewhere, was it?

A. Yes, approximately 7 to 10 days previous to June 3rd that I took the application on the life of Mary Busch.

Q. Now, did you ever have any conversation with the [fol. 520] defendant, Mr. Robert James, about the subject matter of insurance before——

A. No, I didn't.

Q. (Continuing): —you obtained those two applications?

A. No, sir.

The Court: May I ask the witness one question? Were both of these applications obtained on the same date?

A. Yes, sir.

By Mr. Barnes:

Q. You had had a conversation with Mary Busch before that, but not with the defendant, is that it?

A. No, sir.

Q. You hadn't had any application with Mary Busch before you got them?

A. Application? What was your question, Mr. Barnes?

Q. The question was before you got possession or had those applications signed, did you have any conversation with Mrs. James, at that time Mary Busch, about it?

A. Yes, I did.

Q. When?

A. About four or five days previous to the time of taking the application I met her in a beauty shop, and I had a conversation with her.

Q. All right. Was the defendant there at that time?

A. No, he was not.

Q. Was the defendant there at any time when you had a conversation with her, before you actually got the application?

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[fol. 521] A. No.

By Mr. Barnes:

Q. Now, then, did you have a conversation with Mr. James about insurance, after the time you obtained the application of Mary on the $700.00 policy?

Mr. Clark: You mean and before the policy was issued?

Mr. Barnes: Yes, before the policy was issued.

A. Will you repeat that, Mr. Barnes?

[fol. 522] Mr. Barnes: Will you read it, Mr. Obrien?

(Question read by the reporter.)

A. Yes, a slight conversation.

Q. What was that?

Mr. Clark: That is objected to upon the ground that it is incompetent, irrelevant and immaterial.

The Court: It will be overruled.

A. After the $700.00 application was taken and completed, Mr. James asked me if I would insure her for $5,000.00.

Mr. Barnes: Was there a name mentioned, or did he just say, "Will you insure her?"

Mr. Clark: The same objection, if your Honor please.

The Court: Overruled.

A. I can't definitely say whether he said "Mary James", or "my wife". I am sure he said "her", but I can't say definitely that he used the name, because we were sitting together in a very close huddle.

By Mr. Barnes:

Q. That is you and Mr. James; any one else?

A. Me and Mr. James and Mary Busch, who I thought was Mrs. James at the time.

Q. You were all there together?
A. Yes, at the end of the bench.
Q. What did you say?
A. I said, "You are in good health, and you have a certain amount of insurance on your life", and that there [fol. 523] would be an insurance interest.

Mr. Parsons: I couldn't quite understand that?

A. And that there would be an insurable interest, and I would take an insurance on her life.

By Mr. Barnes:

Q. At that time were you informed by any one that Mary James and Robert James were man and wife?
A. No, sir.
Q. Well, in the conversation you had there with Mr. James and Mary Busch, or Mrs. James, was there anything said between them to indicate whether one was the wife or husband of the other?

Mr. Clark: I object—well, I won't object to that.
The Court: You may answer.

A. Nothing was said.

* * * * * * *

[fol. 524] By Mr. Barnes:

Q. Now, Mr. Galatz, I show you—take a look here at the writing above the word "settlement" on People's offer 24. I offer this as 24. Who wrote the answers in that application? Whose handwriting is that?

Mr. Clark: One moment. That is objected to on the ground that it calls for incompetent evidence, and an opinion which it has not been shown that the witness is qualified to express.
The Court: Overruled. Was the application made in your presence?

A. I wrote it out, myself.

Mr. Clark: I withdraw the objection, then.
[fol. 525] Mr. Barnes: That is the reason I offered it, because I thought I knew that he wrote it.
Mr. Clark: I see.

By Mr. Barnes:

Q. I call your attention here to Line 15, where it says——

Mr. Clark: Pardon me. May I suggest that it should not be read until it is offered in evidence.

Mr. Barnes: I am not going to. Where it says "Beneficiary", below that, in answer to that, there is pen and ink.

A. Yes.

Q. Is that yours?

A. Yes, sir.

Q. Neither one of those persons are named. Where did you get the information to put in there?

Mr. Clark: That is objected to upon the ground that it is irrelevant and incompetent.

The Court: Overruled.

A. I got the information from Mr. James.

By Mr. Barnes:

Q. That was in the presence, then, of Mr. James?

A. Yes.

Mr. Clark: That is objected to as incompetent, irrelevant and immaterial.

The Court: Overruled. I didn't get the answer?

A. It was.

[fol. 526] By Mr. Barnes:

Q. After looking at that diagram, is your memory refreshed as to whether or not anybody was mentioned as husband or wife of anybody else?

Mr. Clark: That is objected to as irrelevant, incompetent and immaterial.

The Court: Overruled.

A. At the time that I marked "Robert James" as the beneficiary, I asked him if he was the husband, and I asked her if she was his wife, and she said "Yes", and he said "Yes."

[fol. 527] Q. Now then, I noticed here that in this application—I withdraw that. Is there a place in the application where the beneficiary is named?

A. On line 15. The beneficiary?

Q. Yes. Now, at the time that the beneficiary that you wrote on that line and which you have indicated or pointed to under the word "beneficiary", what was said—give us the whole thing that you told Mr. and Mrs. James and not what your company may have said.

Mr. Clark: That is objected to as incompetent, irrelevant and immaterial.
Mr. Barnes: I hadn't quite finished.
Mr. Clark: I beg your pardon.

By Mr. Barnes:

Q. Tell us all the conversation you had there with Mr. James about the subject of his being the beneficiary and the insurable interest of her husband. I didn't get the conversation before. Tell us what you told her husband and Mrs. James at that time.

Mr. Clark: That is objected to on the ground that it is incompetent, irrelevant and immaterial.
The Court: Overruled; you may answer.

A. I told Mr. James, hoping to write him a policy at the time on his life, that there must be insurable interest shown, that he was asking me to write $5,000.00 for her life so that he could have a larger sum. And so, believing in my own mind——

By Mr. Barnes:

Q. Now, not what was in your own mind. Was anything [fol 528] said there by you to Mr. James as to how much insurance he did have?
A. He told me he had plenty of insurance, had insurance in two or three companies.
Q. Did you ask him how much it amounted to?

Mr. Clark: That is objected to as incompetent, and not proper examination.
The Court: Overruled.

A. He said he had a great deal more than he was seeking for Mrs. James. Then we jumped into the contingent beneficiary, and I stated to Mrs. James it was best to name her as that instead of the first beneficiary.

By Mr. Barnes:

Q. Was there anything said by you concerning the necessity of Mr. James taking some more insurance?

A. Yes, sir.

Q. What was said?

Mr. Parsons: That is objected to as irrelevant.

The Court: Overruled.

A. I said that it would be absolutely necessary for him to have a greater amount of insurance on his life than the amount of insurance that she was writing on her life.

By Mr. Barnes:

Q. Did you tell him how much he would have to take out?

A. $5,000.00 or more.

Q. What did he say?

A. He said, "Really, you know, I want all the insurance [fol. 529] I can get.

Q. Did you take the insurance of Mary James then?

A. Yes, I took the application on Mary James. He satisfied me.

Q. How did he satisfy you?

A. He satisfied me that the amount of insurance was greater.

Q. Than what?

A. Than the amount applied for on Mrs. James.

Q. How did he satisfy you, by showing you documents?

A. No sir, by telling me two or three different times.

Mr. Parsons: Just a minute; just a minute. We move to strike that out.

The Court: Well, I think that is the same conversation that we already have in the record.

Mr. Barnes: Yes, I was trying to find it out.

Q. Did you have any conversation thereafter—By the way, I withdraw that. At that time then, you didn't take any application on the life of Mr. Robert James?

A. No, sir.

Q. Did you have any conversation thereafter with Mr. Robert James about that subject?

A. Yes, I did.

Q. About how long after?

A. About three days later I had a message at my head office telling me that——

[fol. 530] Mr. Clark: Just one moment, now.

Mr. Barnes: You cannot tell us that.

The Court: No, jump right to the conversation that you had in regard to it.

By Mr. Barnes:

Q. Tell us what that conversation was three days later.

A. I approached his office, his barber shop, because of the understanding that I had he was to buy some insurance. Approaching his barber shop I asked him how much insurance I was to write on his life at this time, knowing that there was a change in mind and heart on his part——

Mr. Parsons: Just a moment, your Honor.

The Court: The last portion of the answer "Knowing there will be a change" and so forth, will be stricken.

By Mr. Barnes:

Q. Let me get at it in this way: After receiving some information at your office, you went directly to his home and asked him how much insurance he wanted?

A. Yes, sir.

Q. And you took his application for insurance?

A. Yes, sir.

Q. How much insurance?

Mr. Clark: I object to that as immaterial.

The Court: Overruled.

A. $3,000.00.

Mr. Barnes: Could I get those other policies back from you gentlemen?

[fol. 531] Q. Later the policies applied for in the applications heretofore marked 23 and 24 for identification, were issued by the company?

A. They were.

Q. And were they delivered by you?

A. They were.

Q. To you?

A. To Robert S. James.

Q. I call your attention to a policy, which I now hand you. Is that one of the policies that you issued?

A. It is.

Mr. Barnes: We ask that that be marked for identification as People's Exhibit No. 25.

The Court: It will be received as People's 25 for identification.

By Mr. Barnes:

Q. I show you another policy and ask you if that is the other policy which you delivered after receiving those applications?

A. It is.

Q. About when were those policies delivered?

A. Approximately around the 12th or 15th day of June.

Q. Did you have any conversation with the defendant at the time they were delivered?

A. I did.

Q. State what that was.

Mr. Clark: Just one moment; has the date of that deliv-[fol. 532] ery been fixed?

The Court: Yes, he said about the 15th of June.

Mr. Clark: I object to that on the ground that it is incompetent, irrelevant and immaterial.

The Court: Overruled.

A. At the time I delivered the policies he said he would pay for them after eating, and he was eating at the time that I handed them to him.

Q. He was in a restaurant some place?

A. Yes, sir.

Q. Near the barber shop?

A. Yes, sir.

Q. Did you sit down at the table there with him?

A. I did.

Q. And thereafter did he pay for them?

A. Yes, sir.

Q. How much did he pay you altogether?

A. I don't recollect; he paid the difference in the premium on both policies.

Q. And the difference was what?

A. The difference in the girl's premium of what he had made at the bottom of his policy, and her policy and the full premium.

Q. In other words, you got a down payment, and the balance was made at the time, is that correct?

A. Yes, sir.

[fols. 533-534] Q. Can you tell us the total amount paid?

A. No, I cannot. There is only one——

Q. I mean the total amount on the two policies.

A. Yes.

The Court: That appears on the policy, doesn't it?

A. Yes, sir.

By Mr. Barnes:

Q. How many premiums were paid on that policy?

A. One.

Q. Now, with respect to the policy that was issued and delivered by you to the defendant on his own life, how many premiums were paid?

A. Just one.

Mr. Clark: That is objected to as incompetent, irrelevant and immaterial.

The Court: The answer may stand.

By Mr. Barnes:

Q. Did you ever talk about keeping the policy up at a later date?

Mr. Clark: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. What was the question?

(Question read by the reporter.)

A. No, I did not.

* * * * * * *

[fols. 535-538] By Mr. Barnes:

Q. Mr. Galatz, after the issuance of the $700.00 policy which you identified here, did you have any conversation with the defendant with respect to the sickness of Mary James, and an application therefor, for compensation under that $700.00 policy?

A. I did.

Q. About when was the first conversation?

A. About two or three weeks after the delivery of the policy.

* * * * * * *

[fol. 539] Q. During the course of your negotiations with these people, did you have any barber work done there?

A. Yes.

Q. You did? Had you ever been back in the beauty shop, in the rear part of the barber shop?

A. Since when, sir?

Q. During the time that you had these negotiations with Mrs. James for insurance on her life?

A. No, I was only in the beauty shop once, and that was when I got acquainted with Mrs. James. Then we talked in the barber shop.

Q. The beauty shop was in the rear of the barber shop, was it not?

A. That is right.

Q. When you were in the rear of his establishment, in the beauty parlor portion thereof, you did discuss the question [fol. 540] of life insurance on her life, did you not?

A. I discussed sick and accident insurance, only.

Q. Did you subsequently write a sick and accident insurance policy on her life?

A. I did.

Q. And when was that?

A. On June 2nd.

Q. June 2nd. And at that same time you also discussed life insurance?

A. No, sir.

Q. You didn't discuss that subject?

A. Not with Mrs. James.

Q. Did you give her any rates?

A. No, sir.

Q. And when was the first time you gave her any rates, or discussed the subject of straight life insurance?

A. I never did give her any rates, or discuss life insurance with Mrs. James?

Q. At no time?

A. Only I discussed it with him in her presence.

Q. Did you ever discuss the subject of life insurance with Mrs. James, regardless of who was present?

A. Yes.

Q. And eventually you wrote a $5,000.00 policy on her life, is that right? That is, your company, the Occidental, did?

[fol. 541] A. I wrote her a policy, after a conversation with her and Mr. James on the subject of the life insurance.

Q. And at that time you procured from her the information which you put in the application which is attached to the $5,000.00 policy, did you not?

A. Correct.

Q. And that information contained in the application you procured from Mrs. James, did you not?

A. The one on Mrs. James life I did, yes, sir.

Q. That is the one I am now directing your attention to.

A. Correct.

Q. And I now show you your life insurance policy No. 1122510, upon the life of Mrs. James, and attached thereto is a photostatic copy of your application, is that right?

A. Yes, sir.

Q. And that is the application that you took from Mrs. James, is that correct?

A. Correct.

Q. And the information therein contained you obtained from her, is that correct?

A. I obtained from her directly, yes, sir.

Q. All of the answers to the questions propounded in that application you obtained from her directly, is that right?

A. Yes, sir.

Q. Now, did you know that Mrs. James had made applica-

[fol. 542] tion for a policy with the Mutual?

A. No, sir.

Q. Didn't you tell Mrs. James that due to the delay in the delivery of her policy, that the Occidental, being a company with its Home Office in Los Angeles, could deliver insurance much more rapidly? Was that subject discussed? There was something said along that line, was there not?

A. No, sir.

Q. There was nothing said about the speed with which your company could execute and deliver a policy?

A. No, sir.

Q. Now, did you say anything to Mrs. James with reference to being able to deliver this policy to her at a lesser rate than some of the other companies?

A. I don't recollect, sir.

Q. Did you intimate, or say that you could save any money for her upon the policy?

A. When this policy was purchased——

Q. No, the question is whether or not you said anything upon that subject?

A. I don't recollect, because Mrs. James didn't buy the policy.

Mr. Parsons: I move to strike that out as not responsive.

The Court: The entire answer?

Mr. Parsons: From the first answer.

The Court: It will be stricken from the word "because" on.

[fol. 543] By Mr. Parsons:

Q. Now, did you ever say to her at any time that you could write the insurance for less money?

A. I don't recollect that I did, sir.

Q. Did you ever say that to Mr. James?

A. I don't recollect that I did, sir.

Q. Did you ever tell Mr. James that due to the fact that the Occidental was a local, California company, with an office in Los Angeles, that you could deliver the policy much more rapidly than an eastern concern?

A. I am quite sure I did not.

Q. Would you say that you didn't say that?

A. I would say that I didn't.

Q. Did you know that there was some delay, or that it was taking a little longer, perhaps some time, than the delivery of this other policy?

A. I did not.

Q. You didn't know about that?

A. No.

Q. When this insurance was first discussed, did Mrs. James, in the barber shop, walk over to the cash drawer and obtain $5.00 and pay you? Do you recall such an incident?

A. Are you referring to the issuance of the application?

Q. I will put it this way: At any of the time when you had a conversation with Mrs. James, referring to the subject of insurance, did she hand you any money?

A. I don't recollect if Mrs. James paid the first monthly [fol. 544] premium on the sick and accident policy, or if Mr. James paid.

Q. What is the monthly premium?

A. $3.80, sick and accident policy.

Q. Can you recall that she went over to the cash register? Do you recall any such incident, obtaining some money?

A. I can't recollect if it was Mr. James or Mrs. James that paid that first monthly premium.

Q. But either one or the other, in the barber shop, handed you the cash, is that right?

A. Yes, I can recollect now Mr. James paid it out of the cash register.

Q. Mr. James?

A. Correct.

Q. And she walked up to him and asked him for the money, didn't she, and obtained a $5.00 bill, isn't that right? He took the money out of the register—and handed it to her, and she passed it to you, isn't that the way it happened?

A. I can't remember definitely. I remember that he took the money out. We were back there, and the cash register is in front.

Q. Didn't she walk up to the front, and walk up to Mr. James, and ask for some money, and didn't he hand it to her, and she handed it to you?

A. I can't remember that, exactly.

Q. But you can't remember exactly how the conversation [fol. 545-550] took place?

A. I wouldn't say that Mr. James gave it to her, and that she gave it to me, because I remember that he went into the register and obtained some money.

Q. Who communicated to Mr. James the fact that some money was needed to pay you?

A. I did.

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[fol. 551] GENE WADDLE, called as a witness in behalf of the People, being first duly sworn, testified as follows:

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Direct examination.

By Mr. Barnes:

Q. Mr. Waddle, you are connected with the Occidental Life Insurance Company?

A. I am.

Q. And in 1935 you knew Mr. Galatz?

A. I did, sir.

Q. In what capacity were you connected at the time of 1935 between, we will say April and August?

A. Unit manager, home office agency.

Q. And as such unit manager was Mr. Galatz working as one of those insurance agents under your unit?

A. That is right.

Q. And do you know the defendant, Robert S. James?

A. I do.

Q. Did you see Mr. James at any time in the year 1935?

A. On one occasion.

Q. What was the occasion of your going to see him that time?

Mr. Clark: Just one moment. That is objected to upon the ground that it is incompetent, irrelevant and immaterial [fol. 552] and it assumes facts not in evidence.

The Court: Sustained on the last ground.

By Mr. Barnes:

Q. Did you go to see Mr. James at his place of business?

A. I did.

Q. What was your occasion for you going to see him at that time?

Mr. Clark: That is objected to upon the ground that it is incompetent, irrelevant and immaterial.

The Court: Overruled.

A. As a result of a phone call from him.

By Mr. Barnes:

Q. Where did you see him?

A. Do you mean where did I talk with him or where did I first see him?

Q. Where did you first see him?

A. At the entrance to his barber shop.

Q. As you walked in did you have anything in your hands or under your arms?

Mr. Clark: That is objected to upon the ground that it is immaterial.

The Court: Overruled.

A. Yes, my case.

By Mr. Barnes:

Q. Was there any name on it?
A. No.
Q. When you walked in did he say something to you?
A. He greeted me at the door and asked me if I was Mr. [fol. 553] Waddle.

Mr. Clark: Just a minute. Just answer that directly "yes" or "no", so that I can object to it.
Mr. Barnes: Do I understand that there is an objection pending now?
Mr. Clark: No, I am getting read- to. I am like a rattlesnake; I am just rattling now.
The Court: We are waiting for the next question.

By Mr. Barnes:

Q. What did you say to him then?

Mr. Clark: That is objected to on the ground that it is incompetent.
The Court: Overruled.

A. I answered affirmatively.

By Mr. Barnes:

Q. What did he say to you?

Mr. Clark: That is objected to on the ground that it is incompetent and irrelevant and immaterial.
The Court: Overruled.
Mr. Barnes: In other words, give us that conversation. What did he say and what did you say?
Mr. Clark: Objected to as immaterial.
The Court: The same ruling. Give the conversation as near as you can and the words that you used.
A. The substance of it was that he would like to talk with me and would I walk up the street with him, which I did.

By Mr. Barnes:

Q. Where did you go?
A. About four doors west on the north side of 8th Street [fol. 554] and then followed him into the rear end of a liquor store in which there was a lavoratory and I followed him into the lavoratory.

Q. Was there anyone else there?
A. No, sir.
Q. What kind of a conversation there ensued?

Mr. Clark: Objected to as incompetent, irrelevant and immaterial and entirely outside of the issues of this case.
The Court: Overruled; you may answer.

A. He stated—as he asked me I was conscious of the fact that he had insurance with us that he had Mrs. James' insurance with us and I answered affirmatively, and he stated that he was anxious to learn, that his attorney had asked him to determine what the status of the insurance policy on her life would be in the event of her death, when applied for out of wedlock as man and wife.

By Mr. Barnes:

Q. And what did you tell him?
A. I merely stated——

Mr. Clark: Just a moment—well, I have no further objections.

By Mr. Barnes:

Q. What did you tell him?
A. I stated that I was selling in the home office agency and my position was such that I could not give an accurate answer to such a question, but that he should submit that fact in writing, to make that clearly payable to her.

The Court: Give your reason.

[fol. 555] A. He pointed out that in this particular instance they had contemplated being married, but at the time they were not married. They had planned for it before their marriage but she had been called to Long Beach on some special dental work and had been detained there, which resulted in the wedding being held up and that they had subsequently been married, and wanted to know the status of the insurance with those facts. I told him that I had no authority to give him an absolute authority on it, because the contract was a contract and should be submitted to the company.

By Mr. Barnes:

Q. The contract was a contract that should be submitted in writing to the company?

A. Yes, sir.

Q. When did you have that conversation?

A. I cannot give you the exact date.

Mr. Clark: If you think that is a matter of a certain time I wish you would fix it definitely.

Mr. Barnes: I was going to do it. Do you recall hearing of the death of Mrs. James?

A. Naturally.

Q. Whatever time that was, how long before that was it that you had this conversation, approximately?

A. Approximately two or three weeks.

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[fol. 556] ARTHUR J. HUGHES, called as a witness in behalf of the People, being first duly sworn, testified as follows:

* * * * * * *

Direct examination.

By Mr. Barnes:

Q. You are an Official Shorthand Reporter of the Superior Court?

A. I am.

Q. And in such capacity did you make shorthand notes of certain testimony given in the case of Occidental Life Insurance Company v. Robert James, No. 392270, a copy of which I have in my hand?

* * * * * * *

[fols. 557-558] A. Yes, I identify this transcript.

By Mr. Barnes:

Q. And at the time you made that transcription, was the transcription made from shorthand notes of your own?

A. It was.

Mr. Clark: That is objected to—I wanted to have this objection observed throughout.

By Mr. Barnes:

Q. And were the shorthand notes written at the time when the matters were fresh in your memory?

A. They were.

Q. And after having transcribed your shorthand notes, were you able to say that they truly state the statements made by the witness in that trial?

A. They do.

* * * * * * *

[fol. 559] Mr. Williams: If your Honor please, during the recess Mr. Silverman and I took up with your Honor the matter of the disposition of these rattlesnakes and it was suggested at that time that it would be agreeable to the defendant and to counsel both to the people and the Court and particularly for Mr. Moore, that the rattlesnakes be taken by Mr. Houtenbrink to his snake farm and put there, subject to being called for if counsel should need them.

[fol. 560] Mr. Clark: That is not agreeable to us.

The Court: Well, that was the proposition of Mr. Silverman and we assumed that it would be acceptable to the defense.

Mr. Clark: Well, Mr. Silverman may not have the information, but we expect to have a man upon whom expert knowledge we have some reliance. I think that he will be present tomorrow.

Mr. Parsons: I think either tomorrow, or day after tomorrow.

Mr. Clark: I don't want to put Mr. Moore to any inconvenience.

The Clerk: I don't know what we are going to do with them.

Mr. Clark: We haven't had any opportunity to confer about this. Suppose we do confer about this.

The Court: You may do so.

(Discussion between counsel)

Mr. Clark: That is the only thing that we have in mind that it is going to be difficult to our men to possibly go

out there. If we could have the snakes returned here at a certain time wouldn't that meet the situation, gentlemen?

(Discussion not for the record.)

Mr. Clark: Well, supposing we arrange to have them taken down to the ranch and to make arrangements to bring them here when needed.

Order for Return of Snakes

The Court: Yes, let the record show the stipulation. Let the record also show at this time that the Court orders the return of this exhibit consisting of the rattlesnakes, People's Exhibit 20, from Mr. Houtenbrink and Mr. Houten-
[fols. 561-562] brink is made the agent of the snakes by the further order of the Court and they are not to be disposed of or to be shipped away by Mr. Houtenbrink. Mr. Houtenbrink, will you do that?

Mr. Houtenbrink: Yes, your Honor.

The Court: Well, we will make you the Clerk of the court.

Mr. Clark: To be kept in the same condition as they are now?

The Court: Yes, to be kept in the same box. In other words, keep them exactly in the same situation as they are now as far as possible.

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[fol. 563] Mr. Barnes: Now, pursuant to our agreement yesterday, I take it that it will be stipulated that if Mr. Hughes were here, he would testify that what I am about to read from this transcript, was what was said by the defendant in that proceeding. Is that the understanding?

Mr. Clark: It was stipulated yesterday evening, if the Court please, and the stipulation will be received by us now, namely that subject to the objections which we are to make, Mr. Hughes, as he was present upon the stand, could and would have used the transcript which counsel holds in his hand, and if our objection was overruled, would testify in the exact language of the portions of transcript which counsel desires to read.

[fol. 564] And therefore, subject to the objections that we are about to make, it is stipulated that if the Court deems the matter embodied in the transcript to be relevant

and competent here, that counsel may read it as they stipulated it to be considered in all the features of the testimony of Mr. Hughes, with the same effect as though stated by Mr. Hughes, here on the stand.

However, counsel has submitted to us the matter which he wishes to read and we now object and would object if Mr. Hughes were on the stand testifying and we object, I say, to the substance of the matter as being irrelevant to the issues here, incompetent to establish any of the facts, lacking in foundation in that it is an attempt to prove the declarations or admissions of the defendant without having first established the corpus delicti by other proof and that the greater part of it, at least, is immaterial. I will add immateriality to the other objections. The objections then are that it is irrelevant and outside the issues, that it is incompetent to establish the corpus delicti, and the corpus delicti not having been established, it is incompetent for other purposes, that no foundation has been laid for its introduction in that the corpus delicti has not been otherwise proved, and that it is immaterial. It may be prejudicial and cannot assist the jury in reaching their determination.

The Court: The objection will be overruled.

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[fol. 565] Mr. Barnes: Yes, beginning at page 138: "Direct examination. Robert S. James, having been previously duly sworn, testified as follows: Direct examination, by Mr. [fol. 566] Silverman: Q.—What is your name? A.—Robert S. James. Q.—You are the defendant and cross-complainant in this action? A.—Correct. Q.—What is your occupation? A.—Barber. Q.—Where is your place of business? A.—522 West Eighth Street. Q.—City of Los Angeles? A.—Yes. Q.—How long have you been in business? A.—I have been in business here ten years; at that particular location about two years. Q.—You are the husband of the deceased, Mary E. James? A.—Yes. Q.—When did you first see her?"

Mr. Clark: To which we object on the ground that it is immaterial and is irrelevant and make those general grounds stated in the objection before.

The Court: Overruled.

Mr. Barnes: (Reading.) "I met her about the 1st of

March of this year. Q.—What relation was she to you during her lifetime?"

Mr. Clark: And that is objected to also, upon the grounds last stated.

The Court: Overruled.

Mr. Barnes: The next question is not answered directly. Going to page 139 of the transcript, Mr. Persons——

The Court: I have asked Mr. Barnes to indicate the reading of the pages.

Mr. Barnes: "Mr. Silverman: Yes. When were you married to Mary E. James? A.—Well, I was married in Santa Ana on July 19th. Q.—Before that marriage did you live with her as husband and wife?"

[fol. 567] Mr. Clark: Now, just a moment; that is objected to on the ground that it is wholly irrelevant here and of a character of material cited to prejudice the defendant.

The Court: Objection overruled.

Mr. Barnes: "A.—Yes. Q.—When did you start living with her as husband and wife?"

Mr. Clark: The same objection stated to the last question.

The Court: Objection overruled.

Mr. Barnes: "A.—I started living with her on May the 9th.

By Mr. Silverman: Q.—What year? A.—1935. Q.—Where?"

Mr. Clark: The same objection last stated.

The Court: The same ruling.

Mr. Barnes: "A.—At my home. Q.—Where was your home?"

Mr. Clark: The same objection.

The Court: The same ruling.

Mr. Barnes: "A.—843 West fifty-ninth street. Q.—In the City and County of Los Angeles, State of California? A.—Yes. Q.—And did you have any marriage ceremony at that time?"

Mr. Clark: That is objected to on the grounds last mentioned.

The Court: Objection overruled.

Mr. Barnes: "A.—Yes. Q.—What took place?"

Mr. Clark: The same objection.
The Court: The same ruling.

Mr. Barnes: "A.—Well, I don't know how to answer it; we were just married. Q.—Who married you?"

Mr. Clark: That is objected to upon the grounds that it [fol. 568] is immaterial and irrelevant.
The Court: Overruled.

Mr. Barnes: "A.—A man by the name of Riegel. Q.—And when did that take place?"

Mr. Clark: The same objection.
The Court: The same ruling.

Mr. Barnes: "It took place the night of May the 9th, I believe. Q.—Did you know whether or not that was a real marriage?"

Mr. Clark: The same objection.
The Court: The same ruling.

Mr. Barnes: "Q.—I knew it was not. Q.—Did you cause that ceremony to be performed?"

Mr. Clark: The same objection.
The Court: The same ruling.

Mr. Barnes: "A.—Yes."

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[fol. 569] Mr. Barnes: "Q.—Can you state the circumstances that led to this marriage?"

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Mr. Barnes: "A.—Can I state the circumstances? Q.—What caused you to have the marriage, the circumstances leading up to the marriage?"

Mr. Clark: The same objection that was last made.
The Court: Objection overruled.

Mr. Barnes: "A.—Well, we had been going together and we were very much in love with each other and we wanted to live together and I knew at the time I could not marry her because I was already married."

Mr. Clark: Now, I move to strike the evidence out, and ask that the jury be instructed to disregard it, not only it being prejudicial to the defendant in the defense of the

offense for which he is on trial, but it would not tend to establish any proof in this case.

The Court: Objection overruled.

Mr. Clark: And the motion denied?

The Court: Yes, the motion is denied.

Mr. Barnes: "Q.—Was there any proceeding pending at [fol. 570] that time with regard to that other marriage?"

Mr. Clark: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Barnes: "A.—Yes, I had an annulment pending."

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Mr. Barnes: "Q.—All right, proceed."

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[fol. 571] Mr. Barnes: "A.—Well, I promised to marry her and we wanted to live together."

Mr. Barnes: Apparently continuing the answer, Line 23, "I decided that I would have to figure it out some way to satisfy her to live with me. That was what I decided on."

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Mr. Barnes: "Q.—That was what you did?"

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Mr. Barnes: "A.—That I would get this man to marry us. She would not know the difference until I got my annulment, then I would tell her.

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[fol. 572] Mr. Barnes: "A.—We lived together from then on. Q.—You didn't live together before that time? A.—No. Q.—And where did you live together after that time?"

Mr. Clark: That is objected to on the ground that it is incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Barnes: "A.—Well, we were married, I think, on the 9th and lived there at the house. Q.—The 9th of May? A.—The 9th of May. Q.—1935? A.—This year. Q.—Then what happened?"

Mr. Clark: That is objected to on the grounds previously stated.

The Court: Overruled.

Mr. Barnes: A.—On the 12th we moved into our home on Verdugo Road, 1329 La Canada; and we lived there from then on. Q.—Until she passed away? A.—Yes. Q.—Handing you Plaintiff's Exhibit 1, I will ask you if you have ever seen that before. That is the application for the policy."

Mr. Clark: We will make the general objection interposed before to this specific question.

The Court: Overruled.

Mr. Barnes: "The Court: That is the application for the $5,000.00 policy? Mr. Silverman: Yes, No. 1122510. A.—Yes. Q.—Now I hand you Plaintiff's Exhibit 2, which is the application for the $700 policy, No. 666680, and ask you if [fol. 573] you have ever seen that before? A.—Yes. Q.—When did you first see this Exhibit No. 1, where and when? A.—At the barber shop. Q.—When was that? A.—I think it was the 3rd of June. Q.—When did you see Plaintiff's Exhibit 2 and where? A.—I think that was the same time. Q.—Were you present when these Plaintiff's Exhibits 1 and 2 were filled out and executed? A.—Yes. Q.—Was there any conversation between the agent of the plaintiff company and the applicant, the deceased, Mary E. James, prior to the time that these two exhibits were executed? A.—Yes."

I neglected to state, Mr. Person, that we went over to Page 143, where the policy No. 666680 appears.

Mr. Clark: Where the first word "Application" appears.

Mr. Barnes: Yes. Now, going to Page 144—143 is the question preceding that—the question doesn't appear; apparently the answer continues—"A.—Yes, there was a conversation there. I was cutting the agent's hair. Q.—What agent's hair, the agent that took these applications? A.—Galatz, I believe it was; and my wife was wanting a health and accident insurance policy; and I spoke to him about it, and she had told——"

Mr. Clark: Thereupon, an objection was interposed and sustained.

Mr. Barnes: That is correct. "Q.—What did the agent say, Mr. Galatz? A.—Well, he told her he had a health and accident policy——"

[fols. 574-611] Mr. Clark: Just one moment. I object to the conversation—I don't believe I will object to that. The objection is withdrawsn.

Mr. Barnes: "A.—Well, he told her he had a health and accident policy that would pay her from the first week, and she decided to let him write it, and she told him he had just missed writing her a life insurance policy because she had taken one out with the Mutual—" The answer continuing: "She told him that the Mutual had written her a policy but it had been some time and that the agent had told her to forget about it, that he would not be able to get the policy for her."

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[fol. 612] J. D. Rogers, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The clerk: State your name, please.
A. J. D. Rogers.

Direct examination.

By Mr. Barnes:

Q. Mr. Rogers, where do you live?
A. 317 North 16th Street, Colorado Springs.
Q. In the State of Colorado?
A. In the State of Colorado.
Q. How long have you lived in Colorado Springs?
A. 20 years.
Q. Were you living there in the year 1932 and 1933?
A. Yes, Sir.
[fol. 613] Q. In the year 1932 what was your occupation?

Mr. Clark: Just one moment. The question is objected to on the ground that it is irrelevant, and outside of the issues of this case.

The Court: I can see no particular harm in permitting it as a preliminary question. Answer. What was your occupation in 1932?

A. I was superintendent of the Pike's Peak Auto Highway.

By Mr. Barnes:

Q. What was the nature of that highway at that time?

Mr. Clark: That is objected to upon the ground that it is irrelevant.

The Court: Same ruling.
Mr. Barnes: You may answer.

A. The road was in good shape for traffic.
Q. Was that a State Highway, or privately owned?

Mr. Clark: That is objected to upon the ground that it is irrelevant.
The Court: Overruled.

A. Privately owned.

By Mr. Barnes:

Q. Were you employed by the company owning that road?
A. Yes.

Mr. Clark: That is objected to upon the ground that it is irrelevant and immaterial.
The Court: The answer may stand.

[fol. 614] By Mr. Barnes:

Q. Where were you stationed in the month of September?

Mr. Clark: That is objected to upon the ground that it is irrelevant.
The Court: Overruled. You may answer.

A. Glenn Cove.

By Mr. Barnes:

Q. Tell us where Glenn Cove is with respect to the road?

Mr. Clark: That is objected to upon the ground that it is incompetent, irrelevant and immaterial.

A. It is 11 miles up the road.

By Mr. Barnes:

Q. From what point, sir?
A. From the highway at Cascade, known as Cascade.
Q. That road up Pike's Peak begins at Cascade?
A. Yes.

Mr. Clark: That is objected to upon the ground that it is irrelevant and immaterial.
The Court: Overruled; you may answer.

Mr. Barnes: How far, then, is it from Glenn Cove to the top of Pike's Peak?

A. Seven miles.

Mr. Clark: That is objected to on the ground that it is immaterial.

The Court: The answer may stand. The objection is overruled. Let the record show that the objection is made before the answer, and the ruling before the answer.

[fol. 615] By Mr. Barnes:

Q. Was there any system in force at that time with respect to checking cars that went up and down Pike's Peak Highway from Cascade and back?

Mr. Clark: That is objected to on the ground it is incompetent, irrelevant and immaterial.

The Court: Overruled; you may answer.

A. Yes, the cars were checked at the toll gate, and at Glenn Cove both, checked both ways.

Mr. Clark: I now move to strike the answer out upon the grounds stated in the objection, and upon the further ground that the testimony is incompetent.

The Court: Overruled; motion to strike denied.

Mr. Barnes: What was the system prevailing at that time with respect to the manner in which sight-seers would obtain passage to go up the road from Cascade to the top of the mountain and back again, such as the issuance of tickets, and so forth?

Mr. Clark: That is objected to upon the ground that the system is incompetent for the purpose of proving what occurred in any particular instance, and is likewise incompetent for proving any facts in this case, and that the evidence is irrelevant.

The Court: I am inclined to think the first part of the objection is well taken. Sustained on that ground.

Mr. Barnes: It is only preliminary, your Honor.

The Court: It may be, but I don't think you can prove [fol. 616] what took place on a particular occasion by proving what was the custom.

Mr. Barnes: We are not trying to prove what took place on a particular occasion; it is merely to make plain to the

jury testimony that will follow in respect to a certain checking that took place on that occasion.

The Court: Objection sustained.

By Mr. Barnes:

Q. State whether or not tickets were issued to sight-seers during that period of time, which were collected at various portions of the trip?

Mr. Clark: That is objected to upon all the grounds I have stated.

The Court: Sustained.

Mr. Barnes: Did you se this defendant at any time in the month of September, particularly about the 21st of September, 1932?

Mr. Clark: That is objected to upon the ground that it is irrelevant.

The Court: Objection overruled.

Mr. Barnes: You may answer that "yes" or "no".

The Court: Whenever I overrule the objection you may answer the question, Mr. Rogers.

A. Yes, I seen him the day of the accident.

Mr. Clark: I move to strike out the statement, "the day of the accident", as not responsive to any question, and incompetent.

[fol. 617] The Court: Stricken out.

By Mr. Barnes:

Q. Was there an accident on or about the 21st day of September, 1932?

Mr. Clark: That is objected to upon the ground that there has been no foundation, in that it is not shown that this witness has any personal knowledge, and that the evidence is incompetent and irrelevant.

The Court: You may answer.

A. What was the question?

Mr. Barnes: Read it, Mr. Reporter, please.

(Question read by the reporter.)

A. Yes, sir.

Q. Did you go to the scene of the accident?

Mr. Clark: That is objected to upon the ground that it is irrelevant and immaterial, whether he did or did not.
The Court: Overruled. You may answer.

A. Yes.

By Mr. Barnes:

Q. Prior to going to the scene of the accident did you see this defendant?

Mr. Clark: That is objected to upon the ground that it is irrelevant and immaterial.
The Court: Overruled; you may answer.

A. Yes.

By Mr. Barnes:

Q. Where did you see him?

[fols. 618-619] Mr. Clark: The same objection.
The Court: The same ruling.

A. I saw him at Glenn Cove.

By Mr. Barnes:

Q. When you say him, what did he say to you?

Mr. Clark: Just one moment; that is objected to upon the ground that the evidence is remote and obviously has no bearing on the issues of this case and that it is irrelevant, and further that it is incompetent to show any statements or declarations made at that time and place.
The Court: It doesn't appear to me that it effects the present state of the record.

* * * * * * *

COLLOQUY

[fol. 620] Mr. Barnes: With respect to this offer of proof, we offer to prove by this and other witnesses to be called who are now present in court, that on or about the 31st day of September, 1932, the defendant was going up Pike's Peak with a former wife known as Winona, and also known as Nona P. James. Her name prior to that time had been known as Nona P. Wallace. They were apparently sight

seeing and they had gone up Pike's Peak from the bottom, and that the road leading up there was privately owned and [fol. 621] that tickets were purchased. That the road passed different points and the tickets were delivered and that all automobiles had left Pike's Peak on the occasion on which the defendant and his party went, on this day. And that they were the last ones down and that on the way down the automobile in which the defendant and his wife were riding went over the side of the road. There was what appeared to be an accident. That the defendant went to Glenn Cove—I am not going to give the detail of it, but just the general picture was that it was a good distance in general, and went to the place where the accident had occurred, and found Mrs. James unconscious beside the car, and she was taken to a hospital, and further that the circumstances surrounding this accident or this incident, which appeared on its face to be an accident, was found to be a deliberate plan on the part of the defendant to cause this thing to appear—

Mr. Clark: May I ask how the Court can rule on that with no more indication than counsel has given?

Mr. Barnes: Well, I think probably the Court can fully understand what our object is, and it is the object of this evidence that is now under consideration by your Honor——

Mr. Clark: It does seem to me that an offer of proof should be specific as to every circumstance that they intend to prove, so that the defense will know definitely what it is going to be confronted with, and affirmatively state its position at this time so that the Court may make a ruling as [fol. 622] to what the law is.

Mr. Barnes: I feel we are making our position clearly.

Mr. Clark: Pardon the interruption.

Mr. Barnes: It will take quite a long time to relate them, but the sum total was really susceptible of the construction that this defendant ran this car over the bank, and in the course of doing that, hit her over the head with probably some blunt instrument. And after she was in that condition sent her in the automobile over the bank. Thereafter assistance was received from Glenn Cove, and an ambulance called and she was taken to the hospital. She was operated upon; that while she was in the hospital his actions in some respects were not those of a man who was worried about a women that he dearly loved; that instead of dying in the hospital, she got well and was released therefrom; that

just prior to her release from the hospital the defendant obtained a cottage in a secluded spot and within six days after she was released from the hospital the defendant came home, very conveniently with a grocery boy, and strangely enough found that wife drowned in the bathtub; that prior to these incidents the defendant had obtained $12,000.00 worth of life insurance on her, or caused $13,000.00 worth of life insurance to be issued upon her life; that she had prior thereto $1,000.00 with a certain life insurance company and had had for a number of years and that after the defendant's marriage to her, he became the beneficiary of that policy; that one of these policies was [fol. 623] a double indemnity policy and that as a result of these incidents which we contend were done with the design of the defendant and are reasonably susceptible to that construction, this defendant collected in cash $14,000.00 as the result of the death of his former wife, Winona P. James.

Mr. Clark: If you Honor please—

The Court: Just a minute, Mr. Clark.

Mr. Barnes: The facts further are reasonably susceptible of the construction that her drowning in the bathtub was not an accident, but was done by the design of the defendant.

That in brief, is the testimony upon which we are about to embark in this examination.

* * * * * * *

Mr. Clark: In order that the discussion may proceed, may I make it clear to your Honor, with the offer of proof before us, that we have two lines of objection? One is to [fol. 624] the vague character of the offer of proof, itself, being so vague and indefinite, as to render it impossible for the Court to know at this time what he is called upon to rule about. The other objection is that disregarding any ambiguity in the offer of proof, the evidence offered amounts, in its substance, to an offer to prove that this defendant is suspected by somebody of having committed another crime at another occasion, under other circumstances, for the purpose of obtaining insurance money, or if we disregard counsel's statement that the circumstances are reasonably susceptibel of an interpretation showing the guilt of the defendant, which, I believe, is far from showing

it beyond a reasonable doubt, which is necessary in criminal cases, I say if we waive that, and regard it as an offer to prove the commission of another offense, it comes within the well-established rule laid down by the Supreme Court in such cases as People vs. Lane, in 100 California, and People vs. Glass, in 158 California, and is irrelevant and incompetent, it being an attempt to prove the commission of this crime through the probability that another crime of a like general character has been committed by the defendant.

Now, I worked until a late hour Saturday evening, and made a memorandum of many authorities, which in the haste of the trial has become temporarily mislaid, including some very significant authorities from other jurisdictions. [fols. 625-665] We needn't hesitate about proceeding with the argument, however, by reason of the situation. There is an abundance, I think, of California authorities, bearing upon the point, to furnish your Honor all proper guidance, and I shall be very glad to hear from counsel what law they think they have that sustains their position.

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[fol. 666] Mr. Clark: If we make that assumption, then we are called upon to consider whether or not, assuming that the corpus delicti in this case has been established, a view that I assume that your Honor has been indulging, but one as to which I have sufficient doubt that I have tried to protect my record on it, and assuming that the corpus delicti has been proved, still it is our contention that evidence of another offense is not admissible unless there is some logical connection between it and the offense charged here. The question is a most serious one. Years of time have intervened without any charge having been made. If the evidence exists by means of which the commission of such crime can be proved with the certainty which the law requires, under the doctrine of this Lane case, it is impossible for me to understand why this defendant is not being prosecuted for murder in Colorado instead of here. If he were being prosecuted for murder in Colorado he would have the processes of the Courts there.

Mr. Barnes: We can't do that. It isn't quite in our jurisdiction.

Mr. Clark: He would have the process of the Court by which to produce witnesses resident in that state who could

[fols. 667-684] give testimony throwing light on the fact which might prove his innocence, but if that case is to be tried here, the people may import such witnesses as they see fit to import and the defendant has no opportunity to rebut the testimony of witnesses which they have brought from abroad.

Therefore, I say, following the Lane case, that the general rule is to be rigidly adhered to, and the evidence is not to be received unless it is clearly and unquestionably brought within one of the clear exceptions to that general rule. The only one of the clear exceptions which counsel, with any degree of force have even tried to argue is that of a common plan or system.

* * * * * * *

[fol. 685] Mr. Clark: If we exclude the testimony of Hope, every circumstance outside of the insurance evidence, whatever probative value it has, every other circumstance that has been proved in this case, to my mind bearing upon the subject at all, logically tends to show an accidental drowning of Mary James, rather than a homicide. She [fol. 686] was not killed by any rattlesnake bite. She met her death by drowning. That is the testimony of Dr. Wagner, who found water in her lungs, and that water in her lungs meant that she was alive when submerged in the water. The lungs were then contracting and expanding. That is Dr. Wagner's testimony. The testimony of Hope is that there was a conspiracy to kill her by means of rattlesnake bite, a conspiracy which his evidence leaves uncompleted. According to his testimony such attempts as were made in that direction were futile, and he professes to have no direct personal knowledge of precisely where or how she met her death. The body is found in a pond with a wound upon it which might have then caused her to have fainted and fallen in the pond, and there is some evidence, I think, before the Court already that at that time she was not well, and was under the care of a physician.

The defendant invited two guests to have dinner with him, made purchase of the supplies for the dinner on the way home, and according to all of the witnesses who saw him, manifested genuine evidence of grief upon ascertaining the fact of her death. Other circumstances I might refer to having the same general tendency to show that her death

was accidental, rather than homicidal, I will not bother the Court with now.

Now, having placed those circumstances in the case, counsel comes in and says, "We want to disprove those [fols. 687-692] circumstances, and corroborate the testimony of the man who admits being at least one of the principals in this case, if not the only one. We want to rebut those circumstances, and corroborate the accomplice by showing that this death was not accidental, because Mr. James had another wife who died under circumstances which we contend would support the possible inference that he had murdered her, or the probable inference that he had murdered her." I don't think that can be done. I submit the matter.

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[fol. 693] The general tests of the admissibility of evidence in a criminal case are: 1. Is it a part of the res gestae? 2. If not, does it tend logically, naturally, and by reasonable inference, to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or [fol. 694] does not, whether the other crime be similar in kind or not, whether it be part of a single design, or not. The commonest instance of the admission of evidence of another crime is where it becomes pertinent to prove the scienter or guilty knowledge under the particular charge. Thus, where a man is charged with passing counterfeit coin, it is allowable in order to prove his knowledge that the coin was counterfeit to show that upon other occasions, with knowledge of the false character of the money, he has passed similar coins. In People vs. Cunningham, 66 Cal. 668, in the prosecution of the defendant for the larceny of cattle, to rebut the presumption that the defendant came innocently into the possession of the cattle, it was permitted to be shown that a steer belonging to a third person, which was found in the defendant's possession with the cattle of the complaining witness, was stolen. In People v. Lane, 101 Cal. 514, where the charge was murder, the defense pleaded insanity, claiming that the deflowering of the defendant's daughter by deceased had upset his reason. The people in rebuttal were permitted to show that the defendant had

committed incest with that very daughter, as combating the view that deceased's acts could have deranged defendant's mind."

The Court: I don't think there is any occasion for any formal expression of opinion, except the ruling. I believe the evidence is admissible. One thing, however, should be [fol. 695] mentioned. I am still very much impressed with the case of People vs. George Joseph Smith. In fact, as I look down I see Mr. Morrisey White, who very kindly submitted to me a complete record of the case, he having at one time been connected with the defense of that case, but wisely withdrew.

I believe the evidence is admissible. The Court will so rule. The objection is overruled. You may call down the jury and proceed.

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[fol. 696] J. D. Rogers, recalled as a witness in behalf of the People, and testified as follows:

Mr. Clark: I was wondering, if your Honor please, if I could have the bailiff close the light from the door there. That is better; thank you.

Direct examination (Continued).

By Mr. Barnes:

Q. Now, Mr. Rogers, to give you the continuity of our thought, I am going to read to you one or two questions and answers that are in the record from yesterday and then we will go ahead from there. "Q.—Did you see this defendant [fol. 697] at any time in the month of September, particularly about the 21st of September, 1932? A.—Yes, I seen him the day of the accident. Q.—Was there an accident on or about the 21st day of September, 1932? A.—What was the question?"

The question was then read by the reporter and then your answer, "Yes, sir". "Q.—Did you go to the scene of the accident? A.—Yes. Q.—Prior to going to the scene of the accident did you see this defendant? A.—Yes. Q.—Where did you see him? A.—I saw him at Glenn Cove.

Q.—When you saw him, what did he say to you?" That was the question that provocated the argument. I take it that the objection was overruled to that?

The Court: Yes, the objection was overruled.

By Mr. Barnes:

Q. All right, you may answer that question, Mr. Rogers: When you saw Mr. James at Glenn Cove, what did he say to you or what did you say to him?

A. Well, I didn't see——

Mr. Clark: The question in its present form is different from a moment ago and I object to it as being incompetent, irrelevant and immaterial and that it calls for hearsay testimony, namely what this witness said to the defendant.

The Court: The objection is overruled; you may answer.

A. Mr. James didn't come to me when he came to Glenn Cove.

Mr. Clark: I move to strike that out, your Honor as incompetent, irrelevant and immaterial.

The Court: It will be stricken.

[fol. 698] By Mr. Barnes:

Q. You did see Mr. James at Glenn Cove?

A. Yes, I did.

Mr. Clark: Just a minute; that is objected to on the ground that it is incompetent, irrelevant and immaterial.

The Court: Overruled.

By Mr. Barnes:

Q. And you did talk to him?

A. Yes.

Mr. Clark: Now, just a moment; if the Court please, I hope to interpose an objection to each question asked and I would like to have your Honor give me opportunity to voice my objection before the witness answers.

The Court: Just hold your answers until the attorney objects. You may proceed.

By Mr. Barnes:

Q. Now, leaving out what you had learned had happened before, but coming directly to the proposition of what you

said to the defendant and what he said to you, when you first saw him in Glenn Cove——

Mr. Clark: Just one moment. That is objected to on the ground that it assumes facts not in evidence and that the evidence is irrelevant and incompetent. The assumption is that this witness had some other source of information. I do not think that that information should be given to the jury.

The Court: Well, it does already appear from the evidence that he knew that there was a circumstance——

Mr. Barnes: Something was said a few moments ago, to [fol. 699] the effect that when Mr. James first came to Glenn Cove, something had occurred in my asking him to leave that out.

The Court: All right; the objection is overruled.

By Mr. Barnes:

Q. Leaving that portion out, when you did see Mr. James and had a conversation with him, tell us what you said and what he said in substance as far you now recall.

Mr. Clark: The same objection.

The Court: The same ruling.

A. Mr. James told me he had an accident up the road. I asked him where.

Mr. Clark: I cannot hear the answer of the witness.

A. I asked him whereabouts on the road and he said he didn't exactly know. I asked him if the machine was badly hurt, and he said he didn't know. Then I got a truck and took Mr. James to where the accident was.

Mr. Clark: That was all in the conversation you had with him at that time——

Mr. Barnes: Just a moment. May I examine him?

Mr. Clark: I beg your pardon; I should not have asked him. I am sorry.

By Mr. Barnes:

Q. Now, stopping there for just a moment, before you start up the trail, how far is it, approximately, from Glenn Cove to the top of the Peak?

Mr. Clark: That is objected to on the ground that it is immaterial and irrelevant.

[fol. 700] The Court: Well, I will sustain it upon the ground it has been asked and answered.

Mr. Barnes: Did he say seven miles?

The Court: Yes.

Mr. Barnes: Very well. Is Glenn Cove above the timber line?

Mr. Clark: That is objected to upon the ground it is incompetent, irrelevant and immaterial.

The Court: Overruled.

A. No, it is right at the timber line.

By Mr. Barnes:

Q. And from Glenn Cove up to the top of the Peak, state whether or not it is wooded or has timber or brush upon it.

Mr. Clark: That is objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. Mostly rocks and grass and no timber.

Mr. Barnes: After having this conversation now—Withdraw that. About what time was it that you saw Mr. James or had the conversation that you have related?

Mr. Clark: That is objected to upon the ground that it is irrelevant and incompetent.

The Court: Overruled; he may answer.

A. Sometime around 7 o'clock.

By Mr. Barnes:

Q. And what was the condition of the daylight, as to whether it was light or dark at that time?

[fol. 701] Mr. Clark: That is objected to upon the ground that it is irrelevant and immaterial.

The Court: Overruled.

A. It was then dark.

Mr. Parsons: What was the answer?

Mr. Barnes: "It was then dark."

Q. Did you go up to the place where the accident had occurred?

A. Yes.
Q. In what sort of conveyance?

Mr. Clark: That is objected to.
The Court: He has already testified that it was in a truck.

By Mr. Barnes:

Q. What kind of a truck?
A. A Ford truck.

Mr. Clark: That is objected to——
The Court: Objection overruled.

A. A fruit truck.

By Mr. Barnes:

Q. Did you turn on the lights, or were you without lights?
A. I turned on the lights.
Q. Did you observe, just prior to the time that Mr. James got in the truck with you his clothing?

Mr. Clark: Just a moment; that is objected to upon the ground that it is incompetent.
The Court: Overruled.

[fol. 702] A. Yes.

By Mr. Barnes:

Q. What did you notice about it?

Mr. Clark: That is objected to on the ground that it is immaterial and irrelevant.
The Court: Overruled; you may answer.

A. I didn't see nothing wrong with his clothing.

By Mr. Barnes:

Q. Well now, state whether or not his clothes were neat or disheveled?

Mr. Clark: That is objected to as immaterial and irrelevant.
The Court: Overruled.

A. They seemed to be neat.

By Mr. Barnes:

Q. Did you notice any dirt or other substance upon them?

Mr. Clark: That is objected to upon the ground that it is immaterial and irrelevant.
The Court: Overruled.

A. No.

By Mr. Barnes:

Q. Who rode with you in the driver's seat of the truck?

Mr. Clark: That is objected to on the ground that it is incompetent, irrelevant and immaterial.
The Court: Overruled.

A. Mr. James.

By Mr. Barnes:

Q. Was he sitting next to you?

The Court: The same ruling; you may answer.

A. Yes.

[fol. 703] By Mr. Barnes:

Q. Did you talk to him on the way up as to how this thing had occurred?

Mr. Clark: Objected to upon the ground that it is irrelevant and immaterial.
The Court: Overruled.

A. Yes.

By Mr. Barnes:

Q. State that conversation.

Mr. Clark: That is objected to upon the ground that it is irrelevant and incompetent.
The Court: Overruled.

A. He told me he was looking across the—

By Mr. Barnes:

Q. Keep your voice up, please, Mr. Rogers.
A. He told me he was looking across the valley with a

pair of field glasses. I did say to him that I didn't think you could see much with field glasses at that time of night.

A. And what did he say in reply to that?

Mr. Clark: The same objection, if your Honor please.

The Court: Objection overruled.

A. He said, "I really don't know how it happened."

Mr. Clark: Again my associates complain that they cannot hear the witness. I am sure that the jurors do not get the answer.

The Court: Speak up a little louder.

Mr. Barnes: May I have the jurors indicate when they cannot hear?

The Court: Yes, speak up if you cannot hear. We want [fol. 704] everybody to hear, so speak up if you don't hear any witness or any attorney and if I don't talk loud enough.

By Mr. Barnes:

Q. What was said as to who was driving the car at the time of the accident?

Mr. Clark: That is objected to on the ground that it is incompetent, irrelevant and immaterial.

The Court: Overruled; you may answer.

A. He told me his wife was driving the car.

By Mr. Barnes:

Q. Did Mr. James make any statement about the manner in which he was riding or looking at the scenery?

Mr. Clark: Objected to on the ground that it is irrelevant and immaterial, whether he made any statement or not.

The Court: Overruled. You may answer.

A. He told me——

Mr. Clark: Just a moment; may I ask that he answer categorically?

The Court: Yes, answer that "yes" or "no."

A. Yes.

By Mr. Barnes:

Q. What did he say about it?

Mr. Clark: That is objected to on the ground it is incompetent, irrelevant and immaterial and no foundation has been

laid for the introduction of such testimony and the reason that I contend no foundation has been laid, is that it has not been shown that the evidence relates to this offense or that it has any logical tendency for the commission of this offense, or to disclose any scheme in the execution of which [fol. 705] the two alleged crimes were committed.

The Court: Overruled.

Mr. Barnes: I pretty nearly forgot the question.

(Question read by the reporter.)

A. He stated he was looking through these glasses and I asked him if he didn't know that that car was going over the switch-back and he said he didn't know.

Q. You asked him how he got out of the car?

Mr. Clark: Just one moment. That is objected to on the grounds last stated and upon the further ground that it is leading and suggestive.

The Court: Overruled.

A. He stated to me that he went off with the car 50 feet.

Mr. Barnes: I don't understand that, sir.

A. He stated he went over with the car down 50 feet and jumped.

Q. What did you say to him?

Mr. Clark: That is objected to upon the grounds last stated, and upon the ground that it is leading.

The Court: Overruled.

A. I told him that he must have made a perfect landing.

By Mr. Barnes:

Q. And what did he say?

Mr. Clark: Now, the same objection, your Honor——

The Court: The same ruling.

A. He said that he didn't know—he told me that he had fell down.

[fol. 706] Mr. Barnes: Your Honor, I would like to have the witness draw on the blackboard if I may——

The Court: We have another blackboard in the anteroom.

Mr. Clark: I would much prefer if the drawing be made on paper so that we will be able to embody our drawing in the record.

The Court: You can produce any diagram on paper, but I think it would be satisfactory to put it on the board.

Mr. Clark: Well, if it can be produced upon paper in any event I would prefer to have it on a larger scale.

The Court: I think that is a matter that we don't have any interest in.

Mr. Clark: Well, I was trying to answer your Honor's question.

The Court: I was trying to aid you.

Mr. Clark: Well, I don't know.

Mr. Barnes: Where does your Honor suggest putting the blackboard?

The Court: Where the jury can see it.

Mr. Clark: Of course, your Honor understands that we would object to any conditions that he observed in Colorado, for what he observed there is irrelevant.

The Court: That is understood. The objection is overruled.

Mr. Barnes: Mr. Rogers, I wonder if you would be so kind, sir, as to step down from the witness stand and draw us a diagram of that Pikes Peak road from Glenn Cove to the place where this accident occurred? Would you do that, [fol. 707] please?

Mr. Clark: We object to that upon the grounds last stated.

The Court: The objection is overruled. Talk up louder, Mr. Rogers.

A. Do we want this drawn to the road where the accident occurred?

By Mr. Barnes:

Q. Well, perhaps I can ask you this: How far is it from Glenn Cove to the place where the accident did occur, approximately?

Mr. Clark: Just one moment. That is objected to upon the ground that it is incompetent, irrelevant and immaterial.

Mr. Barnes: I withdraw it.

Q. How far is it from Glenn Cove to the place where the accident is supposed to have occurred?

Mr. Clark: We object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. Two miles.

By Mr. Barnes:

Q. And in that stretch of two miles are there few or many curves and switch-backs?

Mr. Clark: That is objected to upon the ground that it is incompetent, irrelevant and immaterial.
The Court: Overruled.

A. Quite a few curves.

By Mr. Barnes:

Q. Well, perhaps it might be impracticable to draw all of them, Mr. Rogers. Will you draw the road showing two [fol. 708] curves below and one curve above the place where the accident appear-d to have occurred?
A. Yes.

The Court: The same ruling. I am going to assume that your objection is introduced to all of the questions asked the witness and that each objection is overruled.
Mr. Clark: Then your Honor would rather I would not make the objection each individual time?
The Court: The record will show that you make the objection and that I overrule it.
Mr. Clark: This matter seemed to be so serious that that is the reason that I wanted to make the objection that the question was incompetent, irrelevant and immaterial.
The Court: If you want to supplement the objection, I am inviting you to make the objection, and I think, as I stated to the jury at the outset, I appreciate the ability of counsel on both sides of the case, and you are making your objection whenever you deem necessary. You may proceed.
Mr. Barnes: Do you remember that question, now?
The Court: Well, you indicated to the witness that he give the sign as to about where the accident was with two curves above and two below.

By Mr. Barnes:

Q. Will you draw that, Mr. Rogers, and by the way, when you draw it, draw a double line for the road, will you please. Draw the road fairly wide so that we can see it and the jurors in the jury box can see it plainly.

[fol. 709] (Witness does as directed.)

Q. Mr. Rogers, you have drawn on this blackboard and marked a point for the place on that road where this incident occurred, or at least where the car was when you saw it.

A. When I found the car?

Q. Yes, when you found the car.

The Court: Mark it with a big "X" there so we can all see it.

(Indicating on map.)

By Mr. Barnes:

Q. Now, will you run an arrow, and point the arrow downward, so that we will know which way is down.

A. Yes, sir. (Indicating on blackboard.)

Q. Now, that is—I wonder if you would draw the next curve above the accident. Can you do that? Will you put that in here, please, that curve?

A. Yes. (Indicating.)

Q. Thank you, sir. Now, perhaps you can sit down, Mr. Rogers and take this pointer and point to these various places. The place where you have marked there with a cross is the place that you saw the wrecked automobile?

A. Yes.

The Court: Answer out loud.

Mr. Barnes: I will get back here. Maybe that will help you.

Q. Did you observe that automobile before you actually got to that curve?

A. Yes.

[fol. 710] Q. How could you see that?

A. In this skyline when I was on this curve.

Q. That is by looking up—when you speak of the skyline, I suppose you mean when you looked up the mountain you could see some objects apparently on the mountain, shown on the light part of the sky, is that what you mean?

A. Yes.

Q. Where did you drive your truck to when you got out of the truck? Where did you stop your truck?

A. I stopped the truck right here.

Mr. Barnes: May we have that point marked? May I have the liberty of marking that with the Roman numeral I?

The Court. Yes. Perhaps we had better use the arabic number. We will mark the diagram 39 for identification.

By Mr. Barnes:

Q. I take it then you stopped your truck on the road below the place where the automobile was?

A. Below where the car went off.

Q. Below where the car went off?

A. Yes, sir.

Q. The point of the road that is near the top of this blackboard is near the Peak, and the point near the bottom is Glenn Cove. When you stopped the truck, what did you do?

A. I went down to the car.

Q. Down?

A. Down, yes. That is a switch there.

Q. I don't quite understand that. I understood from what you said before that this road was——

[fol. 711] Mr. Clark: May I ask that he lift his face?

A. It was down.

By Mr. Barnes:

Q. Faced down?

A. Yes, faced where the car went off. This is the lower road and I stopped right at that place.

The Court: I cannot hear you, Mr. Rogers.

A. I stopped my truck below where the car went off. I didn't drive the truck across.

By Mr. Barnes:

Q. Let me ask you this, Mr. Rogers: Do I understand you to say that the automobile had apparently gone off the road and gone this way and that it had kept on going——

Mr. Clark: Just a moment; that is objected to on the ground that it calls for a surmise.

The Court: Sustained on that ground.

Mr. Barnes: I don't see how it could be surmise.

The Court: Well, the Court has ruled. In other words, it is also hypothetical as to what would have happened under certain conditions. I think it is hypothetical.

Mr. Barnes: Did your Honor notice where I was pointing?

The Court: Yes.

Mr. Barnes: Suppose your witness would say "Where would the truck go?" It would drop.

Mr. Clark: If that is the case, then the testimony of the witness would prove nothing, if he were allowed to answer [fol. 712] the question that way.

The Court: Gentlemen, I think you can show where the car was found and show where, if there were any, there were marks indicating where a car had gone off and there is some continuity of the physical scene between that point and the point where the car stopped.

Mr. Barnes: Very well.

The Court: As to where the car would have gone if it had continued, I don't think you could show that.

By Mr. Barnes:

Q. Going straight down hill was the hood straight down hill?

A. No the car was going to miss that lower road.

Q. Now then, we have in mind, Mr. Rogers, if you would correctly place this car on the diagram——

Mr. Clark: That is objected to as cross examination of his own witness.

The Court: Overruled.

By Mr. Barnes:

Q. How about that?

A. May I have that again?

Mr. Barnes: Will you read it, please?

The Court: Keep your voice up. We are not going to complain if you speak too loud, but we are going to have to ask to have you repeat if you don't speak loud enough.

(Record read by the reporter.)

By Mr. Barnes:

Q. Will you explain that, Mr. Rogers?

A. I will try to.

[fol. 713] Q. Make it plain to us.

A. This curve is known as a switch-back. It comes down and goes back. Now, this car left this road here and it con-

tinued down this way about 150 feet. Now, does that explain what you want?

Q. Well——

The Court: Well, from the point where it left the road to where it was found, is that down hill?

A. Yes, your Honor.

Q. Now, from the point where it stopped, if we continued the line, was that also down hill?

A. Yes.

Q. Was there any physical object which stopped the car or was in front of the car at the time that you found it?

Mr. Clark: Your Honor, may we have the same objections?

The Court: Yes, they may appear in the record; the objection is overruled.

A. Yes, this car ran across a rock here, if it stopped it.

By Mr. Barnes:

Q. And if the car continued to go down, that is, if a person were to walk down in the manner in which that car was going, it would have eventually come to the road, is that right?

A. Yes, you would come to the road if it came direct, straight.

Q. Yes. Is the road straight down from that car?

A. Well, partly to the side. That is over the switch-back.

Q. You mean on the inside of the curve?

[fol. 714] A. Yes, I drew that as I understand it. The car would be here.

Q. Well, would you put the "X" where it should be?

A. Yes (indicating on diagram).

The Court: Perhaps you had better leave the first "X" and leave the last "X" as——

Mr. Barnes: "X-2".

Q. Now, this is still down hill the way I am making this arrow?

A. Yes.

Q. All right. Now, as I understand it, from the place where you found this car, on down hill, looking straight down hill, you didn't see, unless you would look to the right

or left, you didn't see a portion of the road for some distance, is that right?

A. Looking this way——

Mr. Clark: That is leading and suggestive.

The Court: Overruled. I think that the diagram in front of you would show.

A. Looking down this road.

By Mr. Barnes:

Q. No, no; from the place where the car was.

A. Can I show this road here? Is that it?

[fol. 715] Q. I don't know how to make myself plain.

A. Well, here it is.

Q. If you look directly, and do not look to one side or the other, would you look across a portion of the road?

A. No.

Q. How far is it from that point to the place where you finally hit a road down here?

A. You wouldn't hit no road. You come down here to a creek, looking straight from the car; you would not get near this road.

Q. Very well. Now, how steep is the mountain at the place where "X-2" is marked?

A. About 20 per cent grade.

Q. And is it 20 per cent on the way to the car, or less?

A. It takes up to 30 or 35.

Q. How far from the place where "X-2" is?

A. Approximately 30 feet below here.

Q. 30 feet farther on?

A. It gets steeper.

Q. What per cent?

A. 30 or 35 per cent.

Q. About how far was "X-2", the place where the car was, from the edge of the road?

A. 150 feet from here to where the car left this road here.

Mr. Barnes: May I mark that on the diagram?

[fol. 716] The Court: You may.

Mr. Barnes: And I will put it out like this, to make it plain. That distance is 150 feet when you parked your truck?

A. Yes.

Q. And you walked down to the car?

A. Yes.

Q. What did you see when you got to the car?

A. Mrs. James was laying with her head downhill, on the right-hand side of the car. Her feet were on the running board, either one or both; I couldn't say for sure. Her head was laying downhill.

Q. When you referred to "the right-hand side of the car", I suppose you meant—I withdraw that. When you refer to "the right-hand side of the car", do you refer to the side of the car that has the steering wheel on it, or the other side?

A. The other side.

Q. State the condition of Mrs. James at that time. State whether or not she was wrapped in a blanket, or just what her condition was as you looked at her?

Mr. Clark: That question is compound.

The Court: I don't think so. Basically it inquires as to the condition of her clothing. You may answer.

A. There was no blanket on her at that time. Her clothing was smeared with blood.

[fol. 717] By Mr. Barnes:

Q. Did it appear to have these smears all over it?

Mr. Clark: Well, I object to that——

The Court: I think the question is a little ambiguous.

By Mr. Barnes:

Q. Well, describe the condition of the clothing as you saw it there, as to whether or not the clothing had dust and dirt on it?

A. I didn't see no dirt on her clothes.

Q. What was—what sized obstacle was it that the car was up against at the position "X-2" there?

A. It was up against a rock about 2 feet high, probably about 4 feet square.

Q. And what part of the car was against it?

A. The left front wheel.

Q. Was the car standing up on its wheels, or laying on its side?

A. The car was on its wheels.

Q. Did you look into the car?
A. Yes, sir.
Q. What did you see?
A. There was a lot of blood in the car.
Q. Where?
A. There was blood on the cushion.
Q. What part of the cushion?
A. The back cushion, on the right-hand side. There was blood on the side.
[fol. 718] Q. On what part of the side?
A. Mostly on the right, and there was blood on the floor, the floor boards of the car.
Q. Did you see blood there?
A. A small blood stain somewhere.
Q. Where was it?
A. It was on the floor boards, near the hammer.
Q. What was the condition of the hammer?
A. Well, there was blood all over the hammer.
Q. Were there any other tools there?
A. No, there were no tools in the front of that car, except that hammer.
Q. Did you find any blood on the left-hand side, under the driver's wheel?
A. There was some on the floor boards, but not on the cushion.
[fol. 719] Q. Did you cause the lady, Mrs. James, to be removed from that place? By "that place", I mean "X-2", beside "X-2". Did you take her away or cause her to be taken away?
A. Yes.
Q. How?
A. Well, I examined the woman, looked at her, and had to go down on one knee by her face to find out whether she was alive or dead.
Q. You listened for her breathing, did you?
A. Yes.
Q. How far was your face from her face at that time?
A. Probably 4 or 5 inches.
Q. Did you notice anything at that time?
A. I smelled liquor.
Q. Was it a strong, or a weak odor?
A. Pretty strong.
Q. Did you assist in lifting Mrs. James?
A. Yes, sir.

Q. And when you lifted her, which end did you take, the end with the head, or the feet?

A. I put both my hands under her head.

Q. When you did that, did you feel anything about the head?

A. Yes, there was a softness behind the ear which I thought might have been a bruise.

Mr. Clark: Just a moment. I move to strike——

[fol. 720] The Court: "Which", and so forth, will be stricken out.

By Mr. Barnes:

Q. You indicated there with your left hand. Do you remember whether it was the left ear, or right ear?

A. As near as I can remember, I thought it was the left. Of course, I might be mistaken there, but I know I found a soft place in that woman's head when I put my hands under her head, when I picked her up.

Q. Was she carried back up the hill to the road?

A. No.

Q. Which way was she carried?

A. The woman was carried down to this road here.

Q. You carried her down, and a little bit to the left, until you came to the road?

A. Yes.

Q. Did you see the ambulance come?

A. Yes, I seen the ambulance come at Glenn Cove, as I had the woman down on this switch-back.

Q. You had placed her there on level ground on the switch-back?

A. Yes.

Q. On a stretcher, or——

A. On a stretcher.

Q. You took a stretcher with her?

A. Yes, there was four men carried her out, including myself.

[fol. 721] Q. Was Mr. James one of them?

A. No, he was walking behind.

Q. While you were here examining this accident, and examining Mr. James, where was Mr. James?

A. Mr. James was, when I noticed him after I got straightened out to remove the woman, was sitting probably 20 or 25 feet away, on a rock.

Q. And after having taken the lady that you found there to this switch-back on this stretcher, did your wait there until the ambulance got her and took her away?

A. Yes.

Q. And you saw that occur?

A. Yes.

Q. Then after that did you go back to the place where the car was and trace the tracks of the car?

A. Yes.

Q. Describe to the jury where you traced them to, and indicate with the pointer, if you will.

A. After I loaded the woman down here, I walked back up to where my truck was right here. Then I called the man's attention to stop, because I wanted to investigate the tracks of the car here. As part of my duties——

Q. Wait a minute, now. Here is the car right here. This is the roadway in here. Now, just indicate the roadway, please.

A. I went over here to where this car went off. I traced [fol. 722] these tracks back approximately about 80 feet.

Q. Was that in the turn part, where you traced them back?

A. Yes, right in here.

Q. All right.

A. Now, this car came down and turned just a little ways. Instead of turning plumb around, it only just turned a little and started and went approximately 80 feet until I went over here.

Q. Then from there where it went off it went 150 feet down the hill until it came in contact with this rock?

A. Yes.

Q. Now, did you notice any footprints about the tracks on the road around there?

A. There was footprints starting here back about 80 feet from where the car went off. There was footprints down alongside of the car there where it went down, and where it went off the road.

Q. On what side of the tracks were those footprints?

A. They were on the left side.

Q. That would be the side that the steering wheel of the car was on, is that what you mean?

A. Yes, sir.

Q. And did you see any place where the car had apparently stopped in that turn?

Mr. Parson: Just a moment. That is objected to as calling for an opinion.

[fol. 723] The Court: Sustained.

Mr. Barnes: Well, did you trace these tracks to the place where they began?

A. Yes. Apparently this car had stopped back here about 80 feet, and the tracks went around on to the right side——

Mr. Clark: Just a moment.

Mr. Barnes: By "the tracks" you mean the feet tracks?

Mr. Clark: Just a moment, if you please. I want to move to strike out the part of the witness' answer beginning with the word "apparently".

The Court: Granted.

Mr. Williams: May the record show that the motion to strike is from the word "apparently" to the word "stopped"?

The Court: That portion of the answer of the witness is stricken, in which the witness gives his opinion that the car had stopped. He can state what he saw, and the jury will draw the opinion whether the car stopped.

Mr. Barnes: You can't say, under the rules of evidence, that apparently something happened, or that something did happen that you didn't actually see, but you can tell what there was that you did see that led you to draw certain conclusions. What physical facts you did see you can describe. Now, do I make myself clear, sir?

A. Yes.

Q. Now, then referring to these foot tracks beside this car, were all the foot tracks you saw there pointed in the [fol. 724] one direction, toward the road, or was there a place where foot tracks were going in another direction?

A. They went——

Q. I wish you would point to the road, sir?

A. Went around where this car had stopped.

Q. When you say "where this car had stopped", you didn't see it stop?

A. No.

Q. There may have been something in the roadway there that indicated to you that it had stopped. If there was, please tell us what that was?

Mr. Clark: That is objected to on the ground that it is leading and suggested to on the ground that is leading and suggestive, remote, and speculative, calling for an opinion of the witness.

The Court: I think the question parhaps should be reframed. The apparent opinion of the witness as to where the car stopped will be stricken, and the jury is instructed to disregard it. Technically the witness hasn't said anything with reference to whether the car had stopped, either directly or indirectly.

Mr. Rogers, you back-traced the automobile, is that right?

A. Yes, sir.

Q. And you back-tracked certain footprints?

A. Yes, sir.

Q. Now, did the footprints have the same appearance all [fol. 725] the way up to the point where they ended?

A. Yes.

Q. Did the car tracks have the same appearance from the point where the car apparently left the road to the place that you refer to as about 80 feet back? Was there any difference in the automobile track prints at any point?

A. No, the prints was the same.

Mr. Barnes: Was there a place where there seemed to be a double set of foot tracks?

A. Yes.

Mr. Clark: One moment. That is leading and suggestive. I will waive the objection now.

By Mr. Barnes:

Q. About how far was that from the place where the car had started to go down the hill?

A. About 80 feet.

Q. That is the place you say was 80 feet?

A. Yes.

Q. Now, did that double set of foot tracks go in a straight line, or in a circular line, or how did they go? How did they go, now? Just tell us?

A. The footprints back here 80 feet started here and went around that way.

Q. That is, you could tell by the toe and the heel?

A. Yes.

Mr. Clark: That is objected to as leading and suggestive.

Mr. Barnes: They were pointing in a certain direction, [fol. 726] is that what you mean?

Mr. Clark: Leading and suggestive.

The Court: Overruled.

Mr. Barnes: Is that what you mean?

A. Yes, the toe of the shoe pointed around this way.

Q. Did you see another track pointed in any other direction?

A. It started back and came back here. Is that clear?

Q. Yes, that is clear; thank you. That was about 80 feet back from the edge of the road?

A. Yes, sir.

Q. Did you find any glassware of any kind in the car?

A. Yes, there were some bottles in the car.

Q. Did any bottles, or one of the bottles, have a liquid content?

A. Yes, one of the bottles had some liquid in it, and I figured——

Q. Did you examine it to see what it was, pull the cork out?

A. Yes.

Q. What did it smell like?

A. It smelled alcohol to me.

Q. What color was it?

A. Well, it was—you would call it a light red, a kind of whiskey color.

Q. Did the bottle have a label on it?

[fol. 727] A. Yes, it had a Mexican label.

Q. What was on the label?

Mr. Clark: Just one moment—oh, I guess I need not make the objection. It is not the best evidence. Obviously the label could not be produced.

The Court: You may answer. What was on the label?

A. Well, it was a Mexican brand of liquor; I don't just remember what it said.

By Mr. Barnes:

Q. Was that a quart or a pint?

A. Well, I wouldn't swear to that, because I just don't know exactly.

Q. One or the other, was it?

A. Yes.

Q. And how much liquid was in the bottle when you saw it?

A. There was about two-thirds of it gone.

Q. Did you notice any odor of alcohol on the breath of Mr. James that night?

A. No.

Q. Did you see Mr. James afterward, after that night?

A. Yes, he came up, I don't know how long after.

Q. Approximately?

A. A day or so, or two; something like that.

Q. You would say within a day or two or three afterwards?

A. Yes.

Q. Somewhere along in there?

A. Yes.

[fol. 728] Q. Did you talk with him?

A. Yes.

Q. What did he say, and what did you say?

Mr. Clark: Just one moment. In addition to the general objection interposed, I wish to make the further objection to any statements or conversations with Mr. James that this being an attempt upon the part of the prosecution to prove a murder other than the one with which Mr. James is charged, that all of the rules for the proof of a crime must be observed, including the proof of the corpus delicti by other evidence than the admissions of the defendant, and that this testimony is incompetent upon that additional ground.

The Court: Without being understood as indicating that that rule, as stated in the objection, is a rule of universal application, the Court at this time will permit the variance in the order of proof in order to facilitate the placing of witnesses upon the stand in the natural chronological order. That ruling is made in view of the opening statement, and also in view of the offer of proof. The objection will be overruled.

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[fol. 729] By Mr. Barnes:

Q. Mr. Rogers, I think we were just about to ask you if you had a conversation with Mr. James a day or two or three after this accident. Do you recall that circumstance?

A. Yes.

Q. What was the conversation, Mr. Rogers?

Mr. Clark: Just a moment; to which we object upon the ground not covered by the general objection, that the evi-

dence is incompetent in that it is an attempt to prove the corpus delicti by statements and admissions of the defendant, and for that reason the evidence is incompetent.

The Court: The objection is overruled, you may answer.

Mr. Barnes: You may answer, Mr. Rogers.

A. He asked me if I found a bottle in the car and I said "No". There were bottles there. Some of them were broke, but this one bottle wasn't broke. I told Mr. James it [fol. 730] was, because I wanted to keep this bottle for evidence of liquor in the car.

Q. In the event of some——

Mr. Clark: Just one moment, if you please. May I have an opportunity to make a motion?

The Court: Yes.

Mr. Barnes: Certainly.

Mr. Clark: I move to strike out all that portion of the witness's answer beginning with the word "because".

The Court: Motion granted.

Mr. Clark: And the jury be admonished to disregard it.

The Court: The jury has already been admonished, Mr. Clark, you recall, at the beginning of the trial that whenever testimony is stricken out they are to disregard it.

Mr. Barnes: Now, Mr. Rogers, I am going to ask you if the road as you have drawn it here upon the blackboard, and calling your particular attention to the curves in the road, in the switch-back, whether that fairly represents the width of the road at the curves or whether the road at the curves is wider or narrower than as shown there?

A. The road at the curves is twice as wide as the road going along here.

Q. In what we might call the straight-of-way then you are indicating?

A. This switch-back is what is known as a 60 feet radius. And now it is twice as wide here as that road is back there. [fol. 731] Q. I see.

Mr. Williams: For the purpose of the record, your Honor, may it be indicated that the witness is referring to the first point he is referring to the curve and the latter point he was referring to the straight-of-way.

The Court: It may — so indicated.

By Mr. Barnes:

Q. Can you draw us one segment of this road we will say the portion that I am now indicating, larger, here in the corner, and make the width of the road more or less correspond to the road as it was?

Mr. Clark: To which drawing, of course, we object, upon the same ground that we objected to the previous one.

The Court: Same ruling. Objection overruled.

Mr. Barnes: Can you do that, Mr. Rogers?

A. I can try it; I don't know whether I can or not.

Q. All right, if you will please?

A. If I understand you right you want this road here?

Q. That portion that I am now indicating.

A. Now, you better write which road up there.

Q. If you will just draw it a little larger than it is drawn there and show us.

A. That is as near as I can draw it. (Drawing.)

Q. Thank you very much. Now, if you will just resume your seat, please. These footprints that you have described from a place about 80 feet above the car, ran off the road to the place it went off the road they were along the left-[fol. 732] hand side of the car tracks and where were the toes pointing on those tracks?

A. They were pointing to where the car went off.

Q. And can you describe the appearance of the footprints as to whether they appeared to be similar to a man's or a woman's footprints?

A. To a man's footprints.

Q. Now, at the time the defendant came for you—or you saw the defendant out near the cafe before you went up to the scene of the accident and that night when you did see him, did the defendant cry?

A. He moaned a few times. I don't know whether the man was hurt or moaning for his wife.

Q. Did he cry, is what I asked you.

A. No.

Q. Did he appear to be worried?

Mr. Clark: Just one moment; I shall object to that on the ground that no foundation has been laid for such testimony in that it is not shown that the witness had such an acquaintance and there is no evidence——

The Court: The objection is overruled. It is not received. It is the Manoogin case rule and that covers the cases.

Mr. Barnes: You may answer. Did he appear to be worried?

A. No, he appeared quite calm.

Q. Calling your attention now to the place that you indicated where you saw these footprints going in a somewhat [fol. 733] circular direction, state whether or not the footprints at that point, went around to the righ tracks of the car.

A. Yes.

Q. And which way did the toes of the prints point?

A. Going around it is opened up this way.

Q. Perhaps you can indicate.

[fol. 734] A. Made a circle of that kind, (indicating).

Q. That is, around from the left side tracks to the right side tracks. Now, how about the other way?

A. Coming right back, stopping here, coming right on to where the car went off the switch-back.

Q. Then as you looked at the prints, those appearing on the return from the right side of the tracks, and the left side, did they continue right on then straight down to the place where the car had left the road?

A. Yes.

Q. Were there any other cars came down from the top of Pike's Peak at the time, or from the time that you first saw Mr. James that night?

Mr. Clark: Just a moment. That question is objected to in its present form as being immaterial, and calling for facts clearly not within the knowledge of the witness. The question was so framed as to involve any cars coming down the road, whether they came from the top of the peak, or some intermediate place.

The Court: The objection is well taken; sustained.

By Mr. Barnes:

Q. Is there any other road than the road you have been talking about here that runs into Pike's Peak at any point between the top and Glenn Cove?

A. No road for an automobile; one railroad is all.

Q. Are you able to say whether or not the James car was the last car on that road that night, that afternoon?

[fol. 735] Mr. Clark: Just a moment——

The Court: You can answer that "yes" or "no", first.

A. No.

By Mr. Barnes:

Q. Did you see any other car that night?

A. After this car came down?

Q. Yes.

A. No, this was the last car on the hill. The rest of them were checked out.

Mr. Barnes: That is all.

Cross-examination.

By Mr. Clark:

Q. Now, the town of Glenn Cove, to which you have referred in your testimony, is in the State of Colorado, as I understand it? It that correct?

A. Yes, sir.

Q. It is a little town lying somewhat at the foot of Pike's Peak, is that also correct?

A. Yes.

Q. It is, then, I take it, only a few miles from the large place of Colorado Springs, is that correct?

A. I didn't understand that?

Q. It is only a few miles, then, from Colorado Springs, isn't it?

A. 22 miles from Colorado Springs to Glenn Cove.

Q. And Glenn Cove is situated upon the Eastern Slope of [fol. 736] the Rockies, is it not?

A. Yes, sir.

Q. What would you say its elevation is?

A. 11,425 feet.

Q. Timber line there is, oh, something over 10,000, isn't it?

A. A little over 11,000.

Q. And Glenn Cove, then, is not up to timber line?

A. Just about.

Mr. Barnes: Mr. Clark, may I interrupt just a moment?

Mr. Clark: Certainly.

Mr. Barnes: I neglected to show this witness the picture, and I would like to do it as part of my direct, if I may.

Mr. Clark: Of course, anything you overlooked, I would rather you do it right now.

The Court: You may reopen it.

Mr. Barnes: I would like to reopen the direct, your Honor.

Mr. Clark: Mr. Barnes, if you will approach the bench with me, I may be able to offer a stipulation.

The Court: I don't think the Reporter need come up.

Mr. Clark: No.

(Discussion at bench.)

Mr. Clark: If you gentlemen will hand the photographs to Mr. Barnes, I think he can separate them so that we can offer a stipulation as to some of them. Might I inquire [fol. 737] what the number of the last exhibit is?

The Court: 39 is the black board diagram.

Mr. Clark: I have had submitted to me by counsel for the prosecution four photographs——

Mr. Barnes: Counsel doesn't think we can stipulate.

Mr. Clark: I will not state the stipulation.

Mr. Barnes: I have here three photographs which I will ask to have marked for identification, your Honor, as-- 40 is the next number, is it, your Honor?

The Court: 40, yes.

Mr. Barnes: 40, 41 and 42.

Mr. Clark: If I may come around and see which photographs you are referring to.

Mr. Barnes: 40, 41 and 42.

Mr. Clark: Are you offering them at this time?

Mr. Barnes: I just had them marked for identification.

Mr. Clark: That is all right.

Mr. Barnes: And if I may have those marked as 40, 41 and 42 for identification, your Honor?

The Court: Yes.

Direct examination (Continued).

By Mr. Barnes:

Q. I show you, Mr. Rogers, a picture marked People's Exhibit 40 for identification. Have a look at that, please, sir, and state whether or not that picture fairly represents the topography of that country concerning the turn in the [fol. 738] road where this accident occurred, as it existed about September, 1932?

Mr. Clark: The competency of that question is objected to upon the grounds that have been expressed in the reasons for the general objection that I have made, and I object to the question as calling for an opinion which it has not been shown that the witness is competent to express, and in that connection, if your Honor has any doubt as to the validity of the question, I would like to ask a few questions on voir dire.

The Court: You may do so.

By Mr. Clark:

Q. The fact is, sir, that a great deal of rural work has been done on that road since you saw the defendant there, isn't that true?

A. Yes, that is true.

Q. It is also true that the photograph which you hold in your hand has been taken within the last few weeks?

A. I just couldn't state when it was taken.

Mr. Barnes: We will agree to that, Mr. Clark.

By Mr. Clark:

Q. And it shows the conditions as they existed long after the work that we have just spoken of was done?

A. Yes, this is the place.

Q. It doesn't show the conditions as the conditions existed there before the work was performed, during the last four years, does it?

[fols. 739-742] A. There was no work done during the last four years.

Mr. Clark: I move to strike that answer as being a matter of opinion.

The Court: Well, I think that it is at least partly responsive. The motion will be denied.

By Mr. Clark:

Q. You didn't take the photographs, yourself?

A. No, sir.

Q. You were not present when it was taken?

Mr. Barnes: I think that is a matter of cross-examination.

The Court: I think so.

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[fol. 743] By Mr. Barnes:

Q. Calling your attention to People's Exhibit 40 for identification, does that photograph fairly represent the condition of the topography of that country about the place where this accident happened, as it appeared on or about September, 1932?

Mr. Clark: That question is objected to upon the ground that it calls for an opinion or a conclusion which the witness is not competent to give and it calls for a comparison between the conditions depicted upon the photograph and those which existed in 1932, and such comparison is incompetent in that no foundation has been laid for the introduction of the photograph, and of course, the general objection that has been interposed to all of this line of testimony.

The Court: Any objection will be overruled.

Mr. Barnes: Will you read the question now, Mr. Reporter, so the witness may answer it?

(Question read by the reporter.)

A. The road is the same, but this snow here on this picture that you see, those spots, wasn't there then. Of course, that snow doesn't interfere with the road. This road is [fol. 744] clear, this switch-back, the same as it was when this car went over. I don't see any snow right on that road there.

Q. Aside from the snow as it appears on the hill, would your answer be that it does substantially show those conditions as they existed in September, 1932?

A. Yes.

Q. Calling your attention now to the roadway shown in this picture, is that a picture of the road on this particular turn where the car went over?

Mr. Clark: Just one moment. Nothing other than the general objection.

The Court: Overruled. You may answer.

The Witness: May I have the question, please? Is this the picture of the switch-back, is that what you want to know?

Mr. Barnes: The witness said to me "Is this a picture of the switch-back, is that what you want to know?" Keep

your voice up, please, Mr. Rogers, because the jury has to hear everything. Yes, that is what I want to know.

A. Yes, that is the picture of the switch-back.

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[fol. 745] Mr. Barnes: Now, calling your attention to People's Exhibit No. 41 in evidence, this picture which shows the general topography of the country, do you recognize any particular rock in there as being one about which you have testified here?

A. Yes, this rock here.

Q. You are pointing——

Mr. Clark: Showing a rock in the middle of the foreground somewhat slightly to the left of the exact center.

Mr. Barnes: And between two men who are standing there.

Mr. Clark: No, my eyes don't see the two men.

[fol. 746] Mr. Barnes: Well, mine do, Mr. Clark.

Mr. Clark: That is not very distinct.

Mr. Barnes: One man, I beg your pardon.

Mr. Clark: I see one man very distinctly.

Mr. Barnes: All right. The rock that you refer to and pointed to is near a man, is that correct?

A. Yes.

Q. The only man shown in the picture?

A. Yes.

Q. What rock is that?

A. That is the rock where the car stopped the night it went over the bank.

Q. This picture is taken looking with the camera facing or looking toward down hill, is it?

A. Yes.

Q. Calling your attention now to People's offer 42—by the way, while we are on this one picture, may I show this to the jury or would your Honor prefer to show them all a little later on?

The Court: I think perhaps we had better show them all at once.

By Mr. Barnes:

Q. Calling your attention now to People's offer 42 for identification, do you recognize the scene shown in the picture?

A. Yes.

Q. Does that fairly depict a portion of that mountain road——

[fol. 747] A. Yes.

Q. —as——

Mr. Clark: Just a moment. Let him finish asking the question and then I will object. Go ahead and finish your question, please.

Mr. Barnes: May I have the question as far as I went?

(Question read by the reporter.)

By Mr. Barnes:

Q. —as it appeared at a time about September, 1932?

Mr. Clark: That is objected to on all the grounds that were stated in the objections to the questions about the first photographs that were shown to the witness.

The Court: Objection overruled.

Mr. Barnes: You may answer.

A. Yes, this is part of the road.

Q. Can you tell us just what part of the road that is?

Mr. Clark: May it be understood that I am persisting in my objection to all questions concerning any of these photographs?

The Court: The general objection made by Mr. Clark is assumed to be made to each of these photographs as they are shown to the witness and to the questions that are asked, and it is understood that to each and every one of them the objections are overruled.

Mr. Clark: Thank you, your Honor. I don't think it will be necessary after this for me to stand up here and possibly [fol. 748] annoy Mr. Barnes.

Mr. Barnes: I will be glad to have you, Mr. Clark, if it will assist you in your examination of the witness.

Mr. Clark: I know you would be glad to have me, Mr. Barnes, but I am not anxious to have a comparison drawn between your appearance and mine.

Mr. Barnes: Was that last question answered, your Honor?

The Court: I think not.

Mr. Barnes: May we have the question read, Mr. Reporter?

(Question read by the reporter.)

A. Yes.

Q. Tell us, please.

A. This is the two curves below where the car went off.

Q. I have another one——

Mr. Clark: Mr. Barnes, may I be pardoned?

Mr. Barnes: Yes.

Mr. Clark: You will be on these photographs for quite some few minutes, won't you?

Mr. Barnes: Yes.

Mr. Clark: Then, I hope I won't seem discourteous if I leave the room for a short time.

The Court: May I ask if defense counsel desire to supplement the objection of Mr. Clark? Counsel now present will be deemed to have made the same objection that Mr. Clark made to all of this line of testimony.

Mr. Parsons: Thank you very much.

[fol. 749] Mr. Barnes: May I have this photograph I now hold in my hand marked 43 for identification?

The Court: So marked.

By Mr. Barnes:

Q. Showing you People's Exhibit 43 for identification, Mr. Rogers, I will ask you if, in this light you can see that, or if you would rather have the reporter's lamp. There is something in the picture I want you to notice particularly. May I borrow this light, Mr. Person?

The Reporter: Certainly.

By Mr. Barnes:

Q. Now, with that lamp, I call your attention to some writing shown upon a rock there. Have you ever seen that writing before?

A. Yes.

Q. Now, with reference to that writing state whether or not at the time you examined the tracks leading back from this car that you have described in this place whether it was near that writing?

A. Yes, the tracks started from the line of this writing, outside of the road.

Q. Does this picture, People's Exhibit 43 for identification, fairly depict the portion of the rock and the road as it appeared in September, 1932?

A. Yes.

Mr. Barnes: I have another photograph. May I have it marked as 44 for identification?

[fol. 750] The Court: Yes, it will be so marked.

By Mr. Barnes:

Q. Calling your attention to People's 44 for identification, do you recognize that scene as shown there?

A. Yes.

Q. What does it purport to show?

A. It shows part of the switch-off.

Q. Three people standing in that picture near a rock. Is that anyone near the rock that was shown you in the last picture?

A. Yes, sir.

Q. That is right close to that rock, is it?

A. Yes, right close to it.

Q. And does that road in that picture generally represent the general appearance of the road as it appeared in September, 1932?

A. Yes.

Mr. Barnes: Now, I have another photograph that I would like to have marked as 45 for identification, your Honor.

The Court: It may be so marked.

By Mr. Barnes:

Q. I show you another photograph with two cars and showing a portion of the roadway and a portion of the mountain, and showing some white patches which appear to be snow, do you recognize that picture?

A. Yes, sir.

Q. What is that?

[fol. 751] A. That is the switch-back where the car went off.

Q. And outside of the fact that there is snow shown in that picture, and as to the general condition of the topography of the country, does that fairly represent the conditions that existed there in September of 1932?

A. Yes.

Mr. Clark: May I see that?

Mr. Barnes: Yes. (Handing to counsel.) May I have this one that I now hold marked 46 for identification?

The Court: It will be so marked.

By Mr. Barnes:

Q. I show you People's Exhibit No. 46 for identification, and I will ask you if you recognize that turn in the road as there shown?

A. Yes.

Q. I see three men standing in this picture, one which appears to be on the edge of the road and appears farthest away. Were you present when this picture was taken?

A. Yes.

Q. And was that man standing, the one farthest away to which I have just directed your attention, standing in any particular place to your recollection here?

A. Yes.

Q. Where?

A. He was standing where the car went off the road.

Q. So where this one man now appears to be standing, who is wearing the overcoat, is the place where the car went off?

[fol. 752] A. Yes.

Q. The man standing on the righthand side of the picture, dressed in an ordinary suit of clothes, where was he standing?

A. He is standing on the inside of the switch-back.

Q. On the inside?

A. Yes.

Q. And the other man?

A. He is standing where the switch-back starts to cut into the side of the hill. This back road is cut into a mountain.

Q. And does that road, as you saw it there, fairly represent the condition of the road as it was in September of 1932?

A. Yes.

Mr. Barnes: I have another picture that I want to be marked 47, your Honor, for identification.

The Court: It may be so marked.

Mr. Barnes: I show you another picture now, apparently looking down hill. Do you recognize that picture and a certain rock shown therein?

A. Yes, sir.

Q. Does that picture fairly represent the part of the

country as you stand at the top of the road, where this car went off and looked down?

A. Yes.

Q. Will you point to the rock particularly that you recog-
[fol. 753] nize there?

A. This one here.

Mr. Barnes: May we have that rock marked in the picture there, your Honor, marked 1?

The Court: Yes.

Mr. Barnes: There are a number of marks there.

The Court: Do you want to mark it with ink?

Mr. Barnes: Yes, your Honor. There are a number. Draw a circle around the rock. It is not much of a circle, but that is the best I can do.

Q. Was that country, as you see it there, in substantially that same shape and condition in September of 1932?

A. Yes.

Q. We have spoken here of the timber line. Does this picture, 47 for identification, show the timber line?

A. Yes.

Q. By the timber line, do you mean the place where the trees that are shown growing in the picture end?

A. Yes.

Mr. Clark: Mr. Barnes, if I may be pardoned, I was born in Colorado and I have lived in the west all my life and the timber line is used to express the limit of growth of all timber as you go up along. Finally it gets so only the smaller vegetation occurs. The trees will no longer grow. That is the timber line. The latitude is governed by the topography. In fact, it may run up or down to a lower [fol. 754] latitude. Pardon me for making that statement, but I thought it was a convenient time to make it to the jurors who are not familiar with those conditions.

Mr. Barnes: I appreciate that.

Mr. Clark: The Court takes judicial notice of that.

Mr. Barnes: I know nothing about it personally, but I am very glad to have counsel make the statement. I am willing to adopt that in the way of a stipulation, so that the jury may consider that as a fact.

The Court: The species of vegetation is also a factor.

Mr. Clark: Yes, some trees are more tender than others. It depends in part upon the character of the trees.

Mr. Barnes: With the permission of the Court we may have that as a stipulated fact in this case.
The Court: Yes.

By Mr. Barnes:

Q. By the way, what is this rock that you have identified, and which we have encircled with pen and ink?
A. That is the rock that stopped the car.

Mr. Clark: What was the answer?
Mr. Barnes: "That is the rock that stopped the car."
Q. I show you another picture which I will ask to have marked as People's Exhibit 48 for identification.
The Court: It may be so marked.

By Mr. Barnes:

Q. Being a closer photograph of a rock. There is a man standing in the picture also, do you recognize the rock [fol. 755] there shown?
A. Yes, sir.
Q. What is that rock?
A. That is the rock that stopped the car, as far as I can see.

Mr. Parsons: Will you speak just a little bit louder?
Mr. Barnes: He said, "That is the rock that stopped the car, as far as I can see."

Q. And will you point to the rock, so that we can encircle that one? There are one or two others shown in the picture. Will you draw a circle around it, please, showing the whole rock?
A. That is the circle.
Q. We will go over it with a pen. Have you a pen?

Mr. Parsons: No.
Mr. Barnes: May I borrow your Honor's pen again?

Q. Now, the rock that we have encircled in ink is right next to a portion of what appears to be a large rock. Is that all one rock there or two rocks?
A. That is attached to the rest of it.
Q. Attached to the rest of it?
A. Yes.
Q. So it is attached to the portion that leads immediately to the left of the circle as you face——

A. I will try and explain it. Here is a rock here. This is a part of the rock and it runs back into the earth. The face of the rock is about four feet square and about three or [fol. 756] three and a half feet high. I do not know whether you can understand.

Q. Yes, I think that is clear. Now, I don't know what your Honor's purpose is, whether to permit cross-examination before the introduction of these exhibits.

The Court: It might be feasible in this case. Mr. Barnes is reserving the offer of the exhibits before the cross-examination.

[fol. 757] Mr. Clark: May I suggest to your Honor that if he is going to testify concerning these photographs that we will want to examine on cross-examination.

By Mr. Barnes:

Q. Did you see any blankets in the car that was involved in this accident?

A. Yes, there were two blankets, or more; two or three.

Q. And did you do anything with those blankets?

A Yes, I got one of those blankets and wrapped it around this woman.

Q. What kind of a car was it? Was it a touring car, or sedan, or what?

A. A coupe, I guess you would call it. It was a two-seated car.

Q. Two-seated car?

A. One seat in the car, for one or two or three. There was no back seat.

Q. There was no back seat?

A. No, sir.

Mr. Barnes: Cross-examine.

Cross-examination.

By Mr. Clark:

Q. Now, Mr. Rogers, the mountains—may I withdraw that. The vegetation, of course, is heavier near the base of the mountains than near the summit, that is true, isn't it?

A. Yes.

[fol. 758] Q. And as you get up above the timber line, the character of the mountain becomes more rugged, doesn't it?

A. Yes.

Q. You have more sharp pieces of rock sticking up, projecting up above the general surface, don't you?

A. Yes.

Q. That condition is encountered when you come to building roads, isn't it?

A. Yes.

Q. The road building has encountered more difficulty because of that rocky character, hasn't it?

A. Yes, sir.

Q. Now, this road that you have been telling us about is a privately owned road?

A. It was at that time.

Q. It was at that time what you would call a toll road?

A. Yes, sir.

Q. That is, a charge would be charged to every person?

A. Yes, sir.

Q. And it was maintained entirely by private funds?

A. Yes, sir.

Q. And some place upon the road there was some barrier which automobiles could not pass until they had paid the required amount for the use of the road; that is true, is it not?

A. Yes, sir.

[fol. 759] Q. And it was being operated, was it not, as a money-making concern?

A. Yes, I think so.

Q. So that the policy was to take in as much, and spend as little as possible on the road, isn't that true?

Mr. Williams: That is objected to as immaterial.

The Court: Objection sustained.

Mr. Clark: I think it is material.

The Court: So far as the policy is concerned, objection sustained.

By Mr. Clark:

Q. Well, as a matter of fact, a great deal of money was not spent in keeping that road in condition, was it?

Mr. Barnes: Objected to as immaterial.

The Court: He may answer.

Mr. Barnes: It may not have needed the spending of very much money.

Mr. Clark: We will find out about that before we get through, I hope.

A. Well, there was enough money spent on the road to keep it in good shape for cars.

Q. The road was not paved, was it?

A. No, it wasn't paved; no.

Q. Now, is there anything that you can tell us about the road, where it went around curves? Was the road any different there than it was on straight-aways?

[fol. 760] A. Yes, it was wider.

Q. Is that the only difference?

A. Wide and elevated to protect the cars.

Q. And what?

A. Elevated.

Q. Elevated?

A. Yes.

Q. Do you mean raised up?

A. Raised a little to the outside, so it made it safer.

The Court: Do you mean the curves were banked?

A. Yes.

By Mr. Clark:

Q. Banked so that the outside would be higher than the inside?

A. Yes, sir.

Q. So as to make the cars hold the road?

A. Yes.

Q. That is what I was trying to get at. Now, I show you People's Exhibit No. 40. I am afraid I will have to stand here by you for a few minutes, Mr. Rogers. Two Coloradoists ought to get along for a short time without fighting.

A. We will get along all right.

Q. Now, tell me--I notice a wide bare spot extending down to the bottom of the picture. Is that the roadway?

A. This is the upper roadway, from here in to here.

Q. This indicating from where there is a ridge of rocks [fol. 761] along the right-hand margin of the picture, clear to the extreme left-hand margin, where an automobile has been parked, that is what you mean?

A. Yes.

Q. Now, what is the other bare space that seems to slope off downward, just beyond this ridge of rock?

A. That is the circle of the switch-back. The outside is what we would have to call here the lower road. You are contending with two roads right here.

Q. I see. Now, how much was this wider road, or the one that appears to be wider, how much was it banked, the road in the foreground?

A. Do you mean how high was this part of it from this?

Q. Yes, how much higher?

A. About 18 inches.

Q. Now, referring to the upper portion of the picture, that indicates the mountain slope above the road, does it not?

A. Yes.

Q. And I infer from that picture that the prevailing rock there is a granite, is that right?

A. Yes, I guess you would call it granite.

Mr. Clark: That is Exhibit No. 40. Now, you didn't take the photograph, yourself?

A. No.

Q. You weren't present when it was taken?

[fol. 762] A. Yes.

Q. When was it taken?

A. Well, now, I couldn't give the exact date, but when they came to me it was probably three weeks or a month ago.

Q. Do you know who took the picture?

A. Yes.

Q. Who?

(Witness points.)

Q. Mr. Southard?

A. Yes.

Q. Investigator for the District Attorney of this County?

A. Yes.

Q. So far as you knew it was taken for the express purpose of being used in the prosecution of this case?

Mr. Barnes: We submit that is not material.

The Court: Overruled.

Mr. Clark: Read the question.

Mr. Williams: If your Honor please, it is purely speculative.

The Court: Overruled.

Mr. Williams: I think, also, it calls for this witness' conclusion.

The Court: Overruled.

A. Yes.

By Mr. Clark:

Q. Now, I show you Exhibit No. 41. That was taken at [fol. 763] the same time, wasn't it?

A. Yes.

Q. And by the same person, wasn't it?

A. Now, I don't know for sure. There was a camer-man there, and this man that I spoke his name was there, and I couldn't say which one of them took the picture.

Q. Who was the camer-man?

A. I don't know the man's name.

Q. Was he a man who lived at Glenn Cove?

A. No, he didn't live at Glenn Cove.

Q. By the way, I notice the Reporter has it "Glenn Cove". Is that right, or is it "Glencoe"?

A. Glenn Cove is correct.

Q. Thank you. I was mistaken in the name, until I saw it in the transcript. Now, I show you People's Exhibit 42; that was taken at the same time, was it not?

A. Yes, it was taken at the same time.

Q. Either by Mr. Southard, or some other member of the party with him, isn't that true?

A. Yes.

Q. Mr. Southard directed the placing of the car in this photograph marked Exhibit No. 40, didn't he?

A. I don't know whether he placed that car there, or not. I was there, but I didn't pay any attention to what he was doing with the car.

Q. Well, now, I direct your attention to the man stand- [fol. 764] ing at the rock in Exhibit No. 41. Mr. Southard directed the man to stand there, didn't he?

A. Yes.

Q. How many people were present when these photographs were taken?

A. There was five.

Q. Do you know the names of any of the others of them?

A. Yes. The Deputy Sheriff of Colorado Springs was there.

Q. What was his name?

A. Emmett Knight.

Q. There was Emmett Knight, Mr. Southard, yourself, and do you know the names of either of the others?

A. No, I don't.

Q. Were the others local people, or not?

A. So far as I know, they belonged to Colorado Springs. One of them happened to be an ambulance driver, I think, that removed the——

Q. Just pardon me. I think an ambulance driver is sufficient. Now, was he the same ambulance driver that you saw on the day that you saw this defendant?

A. Yes.

Q. Is he here now, do you know?

Mr. Barnes: I object to that as immaterial.

The Court: Sustained.

By Mr. Clark:

Q. Now, your summer heat there extends up to about the [fol. 765] first week in September, doesn't it?

A. What?

Q. I say, your summer heat there continues up to about the first week of September, doesn't it?

A. Yes.

Q. After that there is usually a sharp drop in temperature, is there not?

A. Yes.

Q. By the latter part of September the weather is getting pretty sharp, that is true, isn't it?

A. Yes.

Mr. Clark: This question may be, or seem to be irrelevant, your Honor. Its relevancy will appear in a minute.

Q. Is there a good deal of Poison Oak, or Poison Ivy through there?

A. I never seen any.

Q. Nothing that makes big patches of color through those mountains?

A. There is some shrubbery there above timberline.

Q. And Colorado Springs is a place known to you to have a good many people who go there to spend the summers, isn't it?

A. Yes.

Q. And you have a good many people come up to Glenn Cove to spend the summers, don't you?

A. No, not to spend the summer.

[fol. 766] Q. Well, to spend some parts of it?

A. Part of a day.

Q. Now, a large number of those people make use of this road for the purpose of going to the summit of Pike's Peak, is that not true?

A. Yes, if they want to go up by car they will have to use that road.

Q. And a large number of them do want to go by car?

A. Yes, sir.

Q. So that during the busy season there is quite a string of automobiles going up and down that road, that is true, is it not?

A. Yes sir.

Q. It is also true that accidents were, during 1932, a quite frequent occurrence there, were they not?

A. I don't understand that one?

Q. Well, in the course of the driving on this road a good many accidents occurred in 1932, didn't they?

A. Two, to my knowledge.

Q. Do you mean two including this?

A. No, just one with that one.

Q. One besides this one?

A. Yes.

Q. Those are all that came to your attention?

A. That is all.

Q. Now, I am approximately correct in my understanding [fol. 767] that Glenn Cove is about 1500 miles from here, isn't it?

A. Well, I really don't know.

Q. You traveled some little time to get here, didn't you?

A. Yes.

Q. You came here on business, didn't you?

A. Yes.

Q. The only business that you had here was to testify in this case, wasn't it.

A. That is all I know of.

Q. You were hired to come, were you not?

A. I was asked to come, yes.

Q. Well, you were promised pay for coming and testifying weren't you?

A. Well, I look for them to take care of my expenses, yes.

Q. You say you look for them to take care of your expenses. In fact, you were promised money if you would come out here and give testimony that would help the prosecution, weren't you?

A. No, they asked me if I could come. I told the man that

asked me to see the general manager and see if I could get off.

Q. Before you told him to see the general manager, or when you told him, you had been promised more money if you would come than you were earning there, hadn't you?

A. No.

[fol. 768] Q. You have received money for coming here, haven't you?

A. Yes.

Q. And you expect to receive more?

A. Yes.

Q. Now, Glenn Cove is quite a bit farther north than Los Angeles, isn't it? Of course, it is a great deal farther east, too.

A. Yes, I guess it is a little farther north.

Q. Your summer evenings there are very much longer than they are here, aren't they?

A. I don't know. I wasn't out here very long, to find out.

Q. You haven't been out here long enough to find out how long our evenings are? Well, your sun goes down quite slowly there, doesn't it?

A. Yes.

Q. Your sun, however, goes behind the summits quite a while before the sunlight fades from the valley, isn't that true?

A. Yes.

Q. So that one standing up there long after the shadows have covered the side of the mountains can look off to the east and see the sun shining brightly over the eastern part of the valley, isn't that true?

A. Sometimes, yes.

The Court: Do you mean the eastern part, Mr. Clark?

[fol. 769] Mr. Clark: I mean as the sun gets nearer down, the shadows lengthen, and the western part of the valley will be covered by shadows, while the sun will be shining brightly over out to the east.

The Court: Oh, I thought you meant the sun, itself. Pardon me.

Mr. Clark: I can see that your Honor was not raised in Colorado.

The Court: I was just assuming that the sun set in the west in Colorado, the same as it does in California.

Mr. Clark: It doesn't, your Honor. It protests vigorously. A great many people stopped up there on the mountains, don't they, for the purpose of watching the shadows as they creep eastward over the valley at sunset?

A. Yes.

Q. They take fieldglasses along to use for that, don't they?

A. I suppose so; I don't know.

Q. Haven't you seen them?

A. I have seen them with them; some didn't. What they were for, I never asked them.

Q. Now, on the occasion that you first saw the defendant on the day in September, what day did you say that was?

A. The 21st, as far as I recollect.

Q. What day of the week was it?

A. Well, now, I don't know what day of the week it was. [fol. 770] I would have to go back to the calendar to find that out.

Q. Did you make any written memorandum of the date at the time the accident occurred?

A. Yes.

Q. And have you referred to your written memorandum since for the purpose of refreshing your recollection as to the date?

A. No.

Q. Did you keep a record of the date of all of the accidents that were reported on that road?

A. Yes.

Q. Have you recently had that record under your observation?

A. Yes.

Q. I suppose that the proprietors of the road maintained some place of business at Glenn Cove, did they not?

A. Do you mean the owners of the road?

Q. Yes.

A. No.

Q. At what place at Glenn Cove were you when you first saw the defendant?

A. In the bunkhouse.

Q. He was by himself when you first came there?

A. No, he was in the house when I seen him, and there were six or eight men working there, sitting around.

Q. And he was talking to those men when you first came in?

[fol. 771] A. Yes.

Q. After you came in, the conversation continued with you?

A. Very little conversation, because the man told me that this woman——

Q. Well, the part that you have testified to occurred then, didn't it?

A. What?

Q. I say the part of the conversation that you have testified to occurred then, didn't it, after you came in?

A. Yes, after I seen them I asked them.

Q. Who are the other men that were there when you first saw him?

A. Well, there are some of them still living back there, and some of them I don't know where you would find them.

Q. Well, give me the names of as many as you can remember?

A. There was Ed Callehar, Dan Callehar, Harry Mitchell. Now, that is all the names that I can mind of there.

Q. Well, did any of these men go up with you to where the car was off the road?

A. Yes, sir.

Q. Which ones went with you?

A. Three of them went with me.

Q. The three that you have just named?

A. Yes, sir.

Q. And there were some who were there at the bunkhouse [fol. 772] when you first entered it and found the defendant, whose names you can't now recall? That is correct, is it?

A. Yes.

Q. But none of them went with you up to where the car was?

A. All the men that were working for me went up there.

Q. These three that you have named are all, are they?

A. No, there were four or five more went up there.

Q. You can't remember the names of any of them?

A. No, not right off hand, because I had laid off some men a few days before.

Q. Now, as I understand it, there was altogether a party of eight or nine of you, besides the defendant, is that right?

A. Yes.

Q. Now, how was the defendant dressed on that occasion?

A. Well, he was dressed in some kind of light suit. It wasn't dark; gray, or some such.

Q. Was it striped?
A. Well, it might be; I wouldn't want to swear to that.
Q. Might it have been checked?
A. It might have been, yes.
Q. Are you sure it wasn't khaki?
A. No, I don't think it was khaki.
Q. Was he in his shirt sleeves?
A. No, he had his coat on.
[fol. 773] Q. Did he have an overcoat?
A. No.
Q. Was he wearing a vest?
A. I could't say whether he was, or not.
Q. You observed no wounds, cuts or abrasions upon him?
A. No.
Q. Did you see him walk?
A. Yes.
Q. Did he walk with a limp?
A. No, not that I seen.
Q. Did you observe his clothing for the purpose of seeing whether there was any blood stains on it, or not?
A. I didn't see no blood on his clothes, no.
Q. Did you look for any?
A. No.
Q. Now, directing your attention to your diagram here for a moment, Glenn Cove lies in a general southeasterly direction from the summit of the Peak, does it not?
A. Yes, I believe you would call that southeast.
Q. And the drawing that you have made, is the top of it intended to represent the summit of the Peak? In other words, you are traveling downhill as to go from the upper part of this diagram to the lower part, is that correct?
A. Yes
Q. And when you finally got up there you found this car on the right-hand side of the road facing downward. That [fol. 774] is correct, isn't it?
A. Yes.
Q. You forgot about that when you first took the witness stand, didn't you?
A. No, I don't know that I did. Is this what you are referring to here?
Q. You first placed a cross on the diagram to indicate the position of this car, didn't you?
A. Yes.
Q. And when you first put the cross upon the diagram

you put it upon the right-hand side of the road as you go down that road, didn't you?

A. Yes.

Q. It was after Mr. Barnes corrected you that you remembered that you first saw the car on the left-hand side of the road; that is correct, isn't it?

A. Yes.

Q. Now, that road is built along a side hill, isn't it?

A. Yes.

Q. And on the left-hand side as you go down is the side of the mountain sloping above the road, isn't that true—or, on the right-hand side—yes, on the left-hand side as you go down?

A. Do you mean the side of the road that is cut into the side of the hill?

A. Yes, sir. I am confused myself. Let me straighten [fo'. 775] myself out a moment. Yes, as you go down that mountainside, going toward Glenn Cove, the mountain falls away on your left and rises toward the summit on your right, isn't that true?

A. Yes, for som- ways.

Q. Now, when you saw this car was it below the road, or above the road?

A. The car was above me.

Q. Well, I mean was it below the road it had been traveling on? It didn't run up hill, did it?

A. No.

Q. It ran downhill, didn't it?

A. Yes, sir.

Q. Was the car still standing, or was it overturned?

A. The car was standing, yes.

The Court: I think we had better take our recess, Mr. Clark. The jury will heed the admonition heretofore given. We will take a short recess.

(Recess.)

The Court: You may remain seated, please.

Mr. Barnes: Mr. Rogers.

The Court: Let the record show all parties present. You may proceed.

By Mr. Clark:

Q. Now, Mr. Rogers, when you put the first cross on your drawing there, you were momentarily mistaken as to the location of the car?

A. No, I was not mistaken, because in the drawing of this [fol. 776] picture here, I thought I was on the correct side of the road, but I was not.

Q. All right.

A. I was standing down below.

Q. But when you got up there, how far out of the track was the car?

A. How far up the road, is that what you mean?

Q. Yes.

A. About 150 feet.

Q. Was the car standing practically parallel to the road, or was it turned at some angle?

A. The car came straight down off of this road, and was headed downhill.

Q. The front of the car was headed down hill?

A. Yes, sir.

Q. And the car was standing about 150 feet away from it?

A. Did I understand you to say that the car was standing alongside the road?

Q. Yes.

A. The car was standing 150 feet away.

Q. And the front end of the car was about the same distance from the road as the rear end?

A. No, not quite. The lengths of cars are different. The front of the car was farthest away.

Q. Then the car was standing at pretty near right angles to the road, is that right?

[fol. 777] A. Right angles?

Q. Yes.

A. Coming down the road, the car went off to the left.

Q. I understand it went off to the left, but, Mr. Rogers—may I have the pointer?

Mr. Barnes: Right here.

By Mr. Clark:

Q. I don't want to confuse you. Let me assume then for a moment, Mr. Rogers, that that pointer is the road, and that this pencil is the car. Now, did the car stand something like that, or like this, or how?

A. Like this, (indicating). Now, this is the front of the car.

Q. Yes.

A. And this is the back of the car. That is the way it was. This is your right.

Q. Indicating the car at right angles to the roadside?

A. Yes.

Q. You were driving the truck on the way up, were you not?

A. Yes.

Q. And the other members of the party were seated, some of them in the seat, and some others in the back?

A. There were two of them in the back of the truck.

Q. Two in the back?

A. Yes, two in the back.

Q. And two in the seat?

[fol. 778] A. Yes, there were two in the seat, and there was another truck came up behind with the rest of the men.

Q. I see. About how far down the road from the car was it that you stopped?

A. You mean where I came out of the truck?

Q. Where you stopped your car?

A. That was above the car, when I stopped the truck. Now, I mean by that the car was off the road. I was on this road up here.

Q. About how far above the road would you say you went with your truck, altogether?

A. I stopped right here with the truck. Now, the car was down here.

Mr. Barnes: Now, may I suggest that the jury cannot see where the witness is pointing.

By Mr. Clark:

Q. Now, you say "I stopped up here". You are indicating a place on the diagram where a line has been drawn across the open space?

Mr. Barnes: That is an Arabical numeral "1", and it was directed put there by the Court during the direct examination.

By Mr. Clark:

Q. Now, did you proceed any farther up the road with your truck?

A. No, not until this woman was sent to the hospital.

Q. Now, the other one stopped a little farther down the road?

[fol. 779] A. Which one?

Q. The other truck.

A. Yes.

Q. And the men who accompanied you got out of the truck and busied themselves around the scene of the accident, is that right?

A. Yes, they followed him down.

Q. You don't mean to tell us that all the men stayed together there, do you?

A. Yes.

Q. The men separated some, didn't they?

A. I suppose they did.

Q. What?

A. I suppose they did.

Q. You, yourself, went immediately to the place where Mrs. James was lying?

A. Yes.

Q. And some of the men with you?

A. Yes, sir.

Q. And she was lying, as I understand, with her feet on the running board of the car?

A. Yes, one or more. I don't know whether both feet were on the running board, or not. I couldn't swear to that.

Q. Was she lying upon her back?

A. Yes.

[fol. 780] Q. Anything at all placed over any portion of her body?

A. No, I didn't see anything over her.

Q. How was she dressed?

A. She had on a pair of riding pants, and a pair of boots, I think that was what there was.

Q. Did she have a hat on her head?

A. Not then, no.

Q. You mean that something was placed on her head later?

A. What?

Q. You mean that something was placed on her head later?

A. I put a blanket about her, is all.

Q. What was the condition of the car when you first saw it?

A. It had a broken wheel.

Q. Which wheel?

A. The left wheel.

Q. Was that the left front wheel, or the rear left wheel?
A. The left front wheel.
Q. How was the body?
A. The windshield was shattered.
Q. How about the sides of the car?
A. Well, I didn't pay much attention to the sides of the car right then. They seemed to be all right. I don't know whether the car was—I didn't go into the details of the car to find out how bad it was broke up.
Q. Didn't you see the one side of the car caved in?
[fol. 781] A. The one side of the car caved in?
Q. Yes.
A. There might be a dent in the side of the car; there might be.
Q. You didn't examine the car close enough to know whether that was true, or not?
A. What was true?
Q. That one side of the car was caved in?
A. No, I didn't examine the car that close.
Q. What kind of wheels did this car have?
A. I couldn't state as to that, whether they were wire wheels, or wood spokes; I don't know.
Q. What make of car was it?
A. Studebaker.
Q. Did you notice what year model?
A. No, I didn't.
Q. Did you ascertain the license number?
A. What?
Q. Did you ascertain the license number?
A. No.
Q. Now, when you were up there, as I understand, you saw some blood stains on the car?
A. Yes, sir.
Q. And you asked the defendant how they came there?
A. No.
Q. Did you ask him what he was doing with the hammer?
[fol. 782] A. No.
Q. Did you observe the tires, to see whether there had been any recent puncture repairs?
A. They were in pretty bad shape after the car was taken back to the road, I know.
Q. As a matter of fact, you saw where a puncture had just been repaired in one of those tires, when you first examined it, didn't you?

A. No, I didn't.

Q. When you got there where the car was it was pretty dark, wasn't it?

A. Yes, it was dark.

Q. What kind of lights did you make your examination with?

A. The lights of the trucks.

Q. And the nearest of those trucks was how far from the car?

A. 150 feet.

Q. With what kind of light was your truck equipped?

A. The regular truck lights.

Q. How long were you there altogether?

A. Well, I was there from when I seen this woman loaded into the ambulance until 6:00 o'clock the next morning.

Q. You were there until 6:00 o'clock the next morning?

A. Yes.

Q. Did you make any examination the next morning?

[fol. 783] A. What?

Q. Did you make any examination the next morning?

A. No, because I used a caterpillar to pull this car back with. I examined the switch-back; before I let anything go on the switch-back after that I used the caterpillar to pull the car up with.

Q. Coming back to the day of the accident, when you reached the place where Mrs. James was lying, you immediately busied yourself in trying to render what assistance you could to her, didn't you?

A. Yes, sir.

Q. Some of the men helped you there with that, didn't they?

A. Yes.

Q. You tried to get her into the car, didn't you?

A. What?

Q. Withdraw the question. Some of the men, I said, helped you there? I followed that by asking you didn't all of the men help you with Mrs. James? They did, didn't they?

A. Well, all of them on their turn. They couldn't all get around at the same time.

Q. How many of them were trying to help you render assistance to Mrs. James during the first few minutes you were there?

A. There were four of them.

Q. What were the others doing?

[fol. 784] A. They were standing behind.

Q. All of them standing in a group?

A. They were all around there, yes.

Q. Did any of them leave that group, so far as you know?

A. Not as far as I know.

Q. Isn't it true that one of them stood with Mr. James at some distance from where the wife was?

A. I didn't know that.

Q. Isn't it true that one of them went there and saw the conditions, and became sick, nauseated, and had to leave?

A. Not that I know of.

Q. Isn't it a fact that one of those men stayed with Mr. James up there, and he and Mr. James didn't approach the car closer than a distance of 150 feet?

A. When I seen Mr. James after I went down to this woman, he was probably 25 feet away from the car.

Q. When was that?

A. That was when I went down, came out of the truck, and went down to see this woman, to see how badly she was hurt.

Q. That was immediately upon your arrival?

A. Yes.

Q. Had Mr. James been riding in the truck with you?

A. Yes.

Q. In the seat with you?

A. Yes.

Q. He got out when you did?

[fol. 785] A. Yes.

Q. You went right straight to the scene of the accident?

A. Yes.

Q. Mr. James went right along in the same direction, did he?

A. I think so. I didn't wait to see what he was doing.

Q. Did you hear Mr. James complain of any injuries at the time?

A. He moaned a few times on the way up there.

Q. Did he make any statement as to where he was hurt?

A. No.

Q. Did you notice Mr. James' face?

A. Yes, I did.

Q. Was it pale, or flushed?

A. It didn't seem to be. He seemed to be carrying himself normal.

[fol. 786] Q. About how long was it after you reached there before the ambulance arrived?

A. Well, it would probably be an hour, probably an hour and a half; I wouldn't swear to the exact time of that; I don't know.

Q. Did you stay right there at the car until the ambulance arrived?

A. We carried this woman out to the road.

Q. How many of you carried her out?

A. There were four men carrying her.

Q. At the time she was carried out to the road, was there anyone at all left around the car?

A. No.

Q. While the four men carried her out to the road, what were the others doing?

A. They were changing off. There were four men took turns carrying her.

Q. You took turns carrying her?

A. Yes.

Q. Altogether you carried her a distance of 150 or 200 feet?

A. Probably 200 or a little over.

Q. And that was done within a few minutes after your arrival there?

A. Yes, as quick as we could.

Q. When you got up to the road you looked into the car [fol. 787] for something to wrap her in, didn't you?

A. Yes.

Q. You found some blankets there?

A. Yes.

Q. Had you seen any of those blankets outside of the car?

A. No.

Q. Did you notice whether any of those blankets were bloody or not?

A. No, I did not.

Q. Were the blankets mussed up or folded naturally?

A. The one that I got was lying on the seat.

Q. Folded or just thrown there?

A. Just thrown on the seat.

Q. Was she covered with the blanket immediately upon your getting there?

A. Yes.

Q. And at that time she was stretched out on the ground, I take it?

A. Yes.

Q. Nothing under her except the ground?

A. That is right.

Q. Did anyone stay there to watch her?

A. While he was going after me, is that what you mean?

Q. No, I mean while you were waiting for the ambulance, after you got her up there?

[fol. 788] A. We all stayed there right with her.

Q. And nobody left the group at all?

A. Not that I know of.

Q. During all of this time your attention was principally directed to her body and the car, wasn't it, to her person and to the car?

A. To her, yes.

Q. You weren't paying any particular attention to where any men were or what they were doing, except when they were helping you, were you?

A. No.

Q. The examination that you made up the road, did you make that night or the next morning?

A. That night.

Q. What time that night?

A. Immediately after the ambulance left there.

Q. It was around 10 o'clock when the ambulance left there, wasn't it?

A. Well, somewhere around; I don't know how late it was; I couldn't say that for sure.

Q. Was that a moonlight night?

A. Yes, there was a moon, not very bright.

Q. Did you ask this defendant whether he made those tracks or not?

A. No.

Q. Did you measure or cause any of the tracks to be [fol. 789] measured?

A. No.

Q. Did you ascertain what size shoe the defendant wears?

A. No.

Q. There had been a good deal of traffic on that road during the past summer, had there not?

A. Yes, quite a little.

Q. The road was quite dusty, wasn't it?

A. Yes, there was some dust on the road, yes.

Q. You wouldn't say the dust was uniform, however, would you?

A. Well, I wouldn't want to swear to that, no.

Q. There were some places where the road was hard enough so that it wouldn't retain a footprint, wasn't there?

A. Yes.

Q. The footprints that you did see, they went right along the dusty part of the road, didn't they?

A. Yes.

Q. And the dusty part of the road was the wheel tracks wasn't it?

A. Yes.

Q. Had the fall storms commenced?

A. What?

Q. Had the fall storms commenced?

A. Do you mean was it raining then?

Q. Yes.

[fol. 790] A. No.

Q. Snowing?

A. No.

Q. Any storms on at that time?

A. No, not right then.

Q. Do you know of any snow being on the road that day at all?

A. No.

Q. Those mountains all through there are rocky, are they not?

A. Yes, they are rocky.

Q. Quite a considerable number of small stones are there?

A. In some places.

Q. There are some slanting slabs of rock of considerable size, are there not?

A. Yes.

Q. And pieces have broken off of them in various sizes that are found both above and below the road haven't they?

A. Yes.

Q. Did you comment to the defendant upon the bruised spot that you found on Mrs. James' head?

A. Did I what? I don't understand you.

Q. Let me withdraw the question. Did you speak to the defendant about finding a bruised spot on the woman's head?

A. No.

Q. Did you speak to the ambulance driver about that?
[fol. 791] A. No.
Q. Did you tell anybody about that?
A. No.
Q. Did you report that bruised spot to the sheriff of that county or any peace officer there?
A. No. I made a report to the general manager that I was working for.
Q. You made a report to the company?
A. Yes.
Q. You did that in all cases of accident?
A. Yes.
Q. This case just the same as the others?
A. Just the same as the rest.
Q. And after that you gave the matter no more thought until the investigators from the District Attorney's office came?
A. That is all.
Q. Of course, the report that you made was in writing?
A. Yes.
Q. You haven't it with you?
A. No, I have not.
Q. There is no copy in the State of California, so far as you know?
A. I don't know.
Q. Well, in making that report, you simply reported to the inspector that there was an accident, didn't you?
[fol. 792] A. I reported to the company, yes.
Q. And the report you made to the company was that an accident had occurred at that time and place?
A. Yes.

Mr. Clark: I think that is all.

Redirect examination.

By Mr. Barnes:

Q. With respect to the compensation that you have received or expect to receive, Mr. Rogers, coming here from Colorado, are you expecting to receive or have you received any bonus for coming here, or has it just been the expenses that have been paid and the amount of money lost from your work?

Mr. Clark: Just a moment. I think that is improper redirect examination. My objection goes to the use of the word "bonus". I do object to that as being incompetent, irrelavant and immaterial, and not redirect examination.

The Court: You don't mean the word "bonus" as used would be anything objectionable.

Mr. Clark: I think it would be leading.

The Court: I think it would be a gift. The question is not improper.

Mr. Clark: Very well.

The Court: You may answer. Read the question, Mr. Reporter.

[fol. 793] (Question read by the reporter.)

A. That is all. The expense and the money that I lose.

Q. By that I take it you mean you do not receive and have not received anything but your actual traveling and living expenses, and the amount of money that you are actually out by not working?

A. That is all.

Q. Prior to the time that any arrangements were made for you to come, did you tell what you have testified to here to Captain Jack Southard of the District Attorney's office?

Mr. Clark: Just a moment; that is objected to as incompetent and calls for hearsay evidence, and the character of it can be fabricated.

The Court: If there is any suggestion that there was a recent fabrication, I think you should rebut it on your examination. The objection is overruled.

A. What was that?

Mr. Barnes: Will you read that, Mr. Reporter?

(Question read by the reporter.)

A. Yes.

Mr. Barnes: That is all.

Recross-examination.

By Mr. Clark:

Q. That is the person you did tell it to then, isn't it?

A. Yes.

* * * * * * *

[fol. 794] Mr. Barnes: Miss Grace Yarnell.

Miss Grace Yarnell, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.
The Witness: Grace Yarnell.

Direct examination.

By Mr. Barnes:

Q. Mrs. Yarnell, where do you live?
A. Colorado Springs, Colorado.
Q. Were you living there in September and October of 1932?
A. Yes, sir.
Q. Do you know Mr. Robert S. James, this defendant?
A. I met him at that time.
Q. Did you know Mrs. James at that time?
A. Yes.
Q. Otherwise known as Nona Wallace, prior to her marriage?
A. Yes, sir.
Q. Was she a relation of yours?
A. Yes.
[fol. 795] Q. What was the relationship?
A. Cousin.
Q. I show you here a photograph, Mrs. Yarnell, which I will ask to have marked as People's Exhibit 49. Is that the number?

The Court: Yes, 49 is the next number.

By Mr. Barnes:

Q. And I call your attention to two persons shown in the center and the rear of the photograph standing in the back row, above whose heads there is a circular line with an arrow on each end of the line. Do you recognize the persons shown in that photograph?
A. Yes, sir.
Q. Who are they?
A. One is Winona James and Robert S. James.

Q. Will you indicate those two with a pencil to me there?
A. Yes, sir (indicating on photograph).

Mr. Barnes: May I mark in some way the two indicated by the witness?
The Court: Do you want to encircle them in some way?
Mr. Barnes: Yes, if I may, please. May we have the record show that I am drawing a pen and ink circle around the two identified by the witness?

Q. Now, I will show you this again after I have drawn this circle. Those are the two that are now enclosed in the pen and ink circle?
A. They are.
[fol. 796] Q. Did you see Mr. James and his wife, Winona James in Colorado in September, 1932?

Mr. Clark: That is objected to upon the ground that it is immaterial and irrelevant.
The Court: Overruled.

A. Yes, I did.

By Mr. Barnes:

Q. And were you familiar with the incident where Mrs. James went to the hospital?

Mr. Clark: Now, that is objected to upon the ground that it assumes facts not in evidence and is immaterial, irrelevant and incompetent and incompetent to any issue in this case.
The Court: I think it does assume one fact not in evidence. The objection is sustained.

By Mr. Barnes:

Q. Did you see Winona Wallace James in a hospital?

Mr. Clark: What was that?
Mr. Barnes: Did you see Winona Wallace James in a hospital.
Mr. Clark: That is objected to on the ground that it is irrelevant to all the issues of this case and is incompetent.
The Court: Overruled; you may answer.

A. Yes, sir.

By Mr. Barnes:

Q. When was that?

Mr. Clark: The same objection last stated.
The Court: The same ruling. You may answer.

A. It was on the 21st of Septembe., 1932.

[fol. 797] The Court: Just speak a little bit louder, please.

By Mr. Barnes:

Q. What hospital was it?

Mr. Clark: The same objection.
The Court: The same ruling. You may answer.

A. It was Bethel-El Hospital.

By Mr. Barnes:

Q. It was the Bethel-El, that is hyphenated B-e-t-h-e-l-L, or just B-e-t-h-e-l–E-l?
A. It is the Bethel-El Hospital.
Q. Did you visit her during the time she was in the hospital from time to time?

Mr. Clark: That is objected to on the ground that it is incompetent, irrelevant and immaterial.
The Court: It may be preliminary; overruled.

A. Yes, I did.

By Mr. Barnes:

Q. How long a period was it that she was in the hospital?

Mr. Clark: That is objected to as incompetent, irrelevant and immaterial.
The Court: Overruled; you may answer.

A. She was there from the 21st of September to the 8th of October.

By Mr. Barnes:

Q. During that period of time, did you see her frequently, or infrequently?

Mr. Clark: That is objected to upon the ground that it is incompetent.
The Court: Overruled.

[fol. 798] A. I believe I saw her every day.

Mr. Clark: If you will pardon me just a moment. Will it be necessary for me to repeat the objections that I have made as immaterial and incompetent to the making of every question?

The Court: No, I will assume that your objection is made and it will be understood, unless otherwise shown, that the Court overrules your objection.

By Mr. Barnes:

Q. Did you see any bandages on or about her?
A. Yes, sir.
Q. Where?
A. On her head.
Q. Did you see her head after the bandages had been removed at any time before death?
A. Yes, I did.
Q. Did you see any wounds about the head?
A. Yes.
Q. Where?
A. One was over the right eye and a cut across the nose, and a place under her hair, in the back of her ear.
Q. During the time that you saw Mrs. James in the hospital, did you ever see her get out of bed and walk?
A. Yes, I did.
Q. After she returned—after she left the hospital, at what place did you see her?
A. At her cottage in Manitou.
[fol. 799] Q. Manitou is about how far from where the Bethel-El Hospital was?
A. Probably eight miles or nine miles.
Q. Another little town near that place, is it?
A. Yes, sir.
Q. The Bethel-El Hospital is in Colorado Springs?
A. Yes, sir.
Q. Do you know the day that she went to live in Manitou. what day it was?
A. It was the 8th of October.
Q. The 8th of October?
A. Yes, sir.
Q. Between the 8th of October and the 14th of October, did you see her in her home in Manitou?
A. Yes, I did.

Q. How many times approximately?
A. Every day but one.
Q. And which day was it that you missed?
A. The day prior to her death.
Q. Did you see her out of bed on any occasion when you visited her at her home?
A. No.
Q. Was she sitting up or lying down?
A. Sitting up.
Q. On any occasion when you saw her at the home, did she ever complain of dizzy spells or say that she had at [fol. 800] that time any spell of dizzyness?

Mr. Clark: Just one moment. That is objected to as hearsay, and incompetent.

The Court: The form in which the question is put, that is rather difficult. I don't know what the answer might be as to whether we could consider the rule of hearsay or have the witness answer within the rule of involuntary explanation. In the absence of the showing I am going to sustain the objection.

By Mr. Barnes:

Q. Did Mrs. James have, while you were talking to her, say anything to indicate to you that she was then happy at the time of the talking, or did she have any spell of dizziness or——

The Court: That is objectionable as calling for a conclusion by the witness, Mr. Barnes. I think the testimony would have to be limited as to the appearance, as to whether or not Mrs. James appeared to be that way.

By Mr. Barnes:

Q. Did Mrs. James ever do anything in your presence indicating to you that she was then dizzy?

Mr. Clark: That is objected to upon the ground that it is incompetent, irrelevant and immaterial.

The Court: Sustained. It calls for the witness' interpretation of what she saw.

By Mr. Barnes:

Q. Well, did she appear to be dizzy on any occasion when you saw her?
A. No, she did not.

[fols. 801-803] Q. Did she appear to be fainting on any occasion when you saw her?

A. No, sir.

Q. Did you see her after she had passed away?

A. Yes.

Q. Where did you see her?

A. I saw her that night in her home, and I saw her later in the mortuary.

Q. Now, during the time that Mrs. James was in the hospital, were you ever with Mrs. James alone?

A. Yes, sir.

Q. On any of those occasions did Mr. James ever make any advances to you?

* * * * * * *

[fol. 804] Mr. Barnes: Did you see Mr. Robert James in the hospital, himself, in any room, during September, 1932?

A. Yes, I saw him on that first morning that I went out there.

Q. Was he in some hospital room?

A. He met us in the hall outside of Winona's room.

Q. He was up walking around then, was he?

A. Yes, he was.

Q. At any time did you write a letter after the death of Mrs. Winona James for the defendant?

A. Yes, I did.

Q. Did you have any conversation with the defendant, or [fol. 805] were you present when any one else did, with respect to the subject matter of whether or not the defendant had money, or didn't have money?

A. Well, yes, he said that he didn't have any money.

Q. He told that to you?

A. Yes.

* * * * * * *

Mr. Clark: If your Honor please, I asked that the Court continue in session for a moment for this reason: It has always been my custom, when it seemed probable that a continuance might be necessary, to advise opposing counsel of that necessity at the earliest possible moment. I do that for the purpose of affording the other side ample opportunity in the event a continuance is needed, to prepare to meet the showing made for a continuance. I am advised

that with sufficient time we can rebut a substantial portion of the testimony that has been introduced here today by the [fols. 806 807] witnesses, by witnesses outside of this State. If I had had any information that evidence of this character was going to be offered at the time we were taking depositions, it would have been very slight inconvenience to come past Colorado and have taken the depositions there. I wasn't informed. This is not an application for a continuance; it is simply advising counsel that application will probably arise. When the application is made, it will, of course, be made upon affidavit setting forth the evidence that we expect by means of a continuance to produce, and showing why it could not have been produced at an earlier time. I think that is all that I wish to say at this time.

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[fol. 808] Grace Yarnell, recalled as a witness in behalf of the People, and testified as follows:

The Court: You may proceed.

Mr. Clark: If your Honor please, Mr. Barnes asked the question yesterday evening, and at my request he deferred asking for an answer for that until this morning. I am satisfied to stand on my objection without a further statement of objection.

The Court: Objection overruled.

Mr. Barnes: I will give you the context, read you one of the answers that preceded it on page 801. I had been asking you about Mrs. Winona James and then I asked you: "Now, during that time that Mrs. James was in the hospital, were you ever with Mr. James alone.

The Court: In the transcript, "With Mrs. James."

Mr. Barnes: "Mrs. James", here in the transcript, but it is my recollection that I said. "Mr. James".

Mr. Clark: Page 801, your Honor, lines 9 and 10.

[fol. 809] Mr. Barnes: And then in line 13 the word "defense" should be "advance".

The Court: I have been looking for my personal notes. The transcript on page 801, which now reads, "Mrs. James" is now amended to read "Mr. James", on lines 9 and 10.

Mr. Barnes: And then the words on line 13 of page 801, should be "any advance".

The Court: The word, "defense" will be stricken and the word "advance" inserted instead.

Mr. Barnes: The question therefore will be, Miss Yarnell, "Now, during the time that Mrs. James was in the hospital were you ever with Mr. James alone?" to which you answered, "Yes, sir. Q—On any of those occasions did Mr. James ever make any advance to you? Will you answer that?

Direct examination (Continued):

A. Not excepting a couple of kisses.

Mr. Parsons: What was the answer? We can't hear a word the witness says.

Mr. Barnes: "Not with the exception of a couple of kisses."

Q. When was the first time that he kissed you, Miss Yarnell?

Mr. Clark: Of course, it is understood our objection goes—

The Court: The objection goes to the entire subject matter and the ruling rides with the entire subject matter.

A. I believe it was one afternoon when we were going [fol. 810] somewhere in a car.

Mr. Barnes: I may say to the Court that the witness informed me before she testified that she has a great difficulty at all times in raising her voice, due to some peculiarity of speaking.

The Court: Do the best you can, please.

Mr. Barnes: Miss Yarnell, do the best you can and speak as loud as possible, because as you have observed, it is very hard to hear in this courtroom. How long was that approximately after Mrs. James had been sent to the hospital?

A. Oh, three or four days, I believe.

Q. Was anyone in the automobile beside you and Mr. James at the time that he kissed you on that occasion?

A. No.

Q. And what did you do when he did that?

A. I just moved over out of the way, on the other side of the car.

Q. When was the next occasion that he kissed you?

A. I believe that time we were also in the car, going somewhere.

Q. About how much later was it after the first kiss?
A. A couple of days.
Q. And just you and Mr. James alone on that occasion?
A. Yes.
Q. Did he kiss you or attempt to kiss you on any other [fol. 811] occasion?
A. Once.
Q. Where?
A. In a room at the hotel.
Q. That is the hotel where he was living at that time?
A. Yes.
Q. What was the name of the hotel? I didn't get it.
A. I believe it was the Elk at that time.
Q. What occurred on that occasion?
A. I just told him to cut it out.
Q. Was anyone in the room besides you and Mr. James?
A. No.
Q. Was it his room?
A. Yes.
Q. Yesterday afternoon I showed you a letter—I don't know whether I showed it to you, but I showed it to counsel yesterday afternoon. I show it to you again now, and ask you if you recognize the handwriting upon this letter?

Mr. Clark: Just one moment. I take it it will be deemed that this is subject to our understanding that before any offer is made the original letter will be produced for our inspection?
Mr. Barnes: That is correct.

A. Yes, sir.
Q. Do you recognize the handwriting as shown in this letter that I am now showing you?
[fol. 812] A. Yes.
Q. I see a signature on the last page of the letter did you write that signature there?
A. I did.

[fol. 813] Mr. Barnes: May we have this photostat, which I have been showing the witness, of this letter marked?
The Court: 50 for identification.
Mr. Barnes: Thank you, your Honor.

Q. Did you have any conversation with the defendant about writing the letter shown in the photostat, People's offer 50 for identification?

A. Well, he just asked me to write it for him, and I wrote it.

Q. Did he tell you what to put in the letter.

A. Yes.

Q. He dictated it?

A. Yes.

Q. And after having written the letter, what did you do with it?

Mr. Clark: It is, of course, understood we are still persisting in the general objection made yesterday?

The Court: Yes.

A. I don't remember. I guess it was mailed; I don't know.

* * * * * * *

[fol. 814] By Mr. Barnes:

Q. Did you have any conversation with Mr. James after the accident, as to how the accident had occurred on Pike's Peak?

A. Yes, we discussed it.

Q. What did he say about it?

Mr. Clark: Just one moment. That is objected to upon the additional ground that it is an attempt to prove the corpus delicti in a murder other than that with which the defendant is charged, by the statements and declarations of the defendant, and that no foundation has been laid for the testimony sought to be elicited.

The Court: The objection will be overruled, with the same [fol. 815] comment that was made with reference to the other conversation offered by the prosecution, referring, of course, to the conversations by the defendant. You may answer.

A. He said that Winona was driving the car, and he was looking out over the side with a pair of field glasses, and he didn't notice anything happening until the car started over. He said the door opened, and he was thrown out as the car went over the side.

Q. Did he say anything about what he did for Mrs. James, to make her comfortable, while he got help?

Mr. Clark: That is objected to—oh, I think that is all covered by the general objection.

The Court: I will make the same ruling.

A. He said that he picked himself up, and went down to where the car was, and picked Winona up. He said one of her feet was tangled in the gear shift, and he picked her up and laid her on the ground, and wrapped her in blankets.

Mr. Barnes:

Q. And left for help?
A. And then went for help.

Mr. Barnes: Cross examine.

Cross-examination.

By Mr. Parsons:

Q. Miss Yarnell, did you state that you were a cousin of Mrs. James?
A. Yes, sir.
[fol. 816] Q. And you saw Mrs. James immediately after the accident at the Bethel Hospital, in Colorado Springs, is that right?
A. The next morning.
Q. And at that time you also saw Mr. James outside of the hospital room?
A. I did.
Q. And when you went in the room, did he go in with you folks?
A. He did.
Q. And prior to seeing Mrs. James at the hospital, you had met Mr. and Mrs. James at your home, had you not?
A. Yes, I had.
Q. They had visited there, had they not?
A. Yes, sir.
Q. That was a day or two before this occurrence?
A. It was on the day of the accident.
Q. They had just arrived from the Coast, had they not, so far as you know?
A. They said that they had arrived the night before.
Q. And they came out to your house to visit, is that right?
A. Yes, sir.
Q. And at the time that you were introduced to Mr. James, and by your cousin, Winona, you people greeted one another by kissing, did you not?
A. Well, Winona, yes.
[fol. 817] What is that?

A. We did Winona.

Q. Did you kiss Mr. James?

A. Not on that occasion.

Q. Not upon that occasion. Now, when you saw Mrs. James at the hospital upon this first occasion, the morning after the accident, she was lying in bed, was she not?

A. Yes, she was.

Q. And her head was covered with bandages, was it not?

A. That is right.

Q. Wrapped up?

A. Yes.

Q. Now, some time after that did you have occasion to see her head uncovered, with the bandages off?

A. Yes.

Q. You did, did you not?

A. Yes.

Q. And you observed that there was a cut over the eye, between the eye and the hair, is that right?

A. Yes.

Q. And there was some blood upon the hair, was there not.

A. Yes, sir.

Q. Quite considerable, was there not?

A. Yes, sir.

Q. Her hair was quite matted with blood, was it not?

A. Yes, it was.

[fol. 818] Q. And you visited the hospital almost daily, did you not?

A. Yes, I did.

Q. And upon your visits there, quite frequently you saw Mr. James, did you not?

A. I did.

Q And you folks lived in town, but the hospital is a little ways out, isn't it?

A. Yes, sir.

Q. And had you folks all seen her?

A. Off and on.

Q. We will have to have you keep your voice raised.

A. Yes.

Q. From time to time that Mrs. James was confined in the Bethel Hospital, you were inclined to go and take Mr. James out in the car, were you not?

A. Yes, sir.

Q. On many occasions you took him out there, did you not?

A. Yes, sir.

Q. In fact, right up to and including the time she was moved, is that not right?

A. Right.

Q. Now, during the evening you called at the hospital, did you not?

A. Yes, sir.

[fol. 819] You recall the incident when Mrs. James' father arrived?

A. Yes.

Q. What is the answer?

A. Yes, sir.

Q. That was some days after the accident?

A. It was.

Q. And until about the time of his arrival or shortly after his arrival, there had been both a day and a night nurse?

A. I believe so.

Q. And some time after the arrival of Mrs. James' father, the night nurse was discharged, was she not?

A. Yes, sir.

Q. Or at least you didn't see her any more at night when you visited there at night?

A. Well, just came in and out of the room.

Q. And there was a period of time that Mrs. James was in the hospital, that Mr. James spent the night up there, spending the nights with her?

A. I don't know. We always left about eight.

Q. When you left, Mr. James was quite frequently there with his wife?

A. Yes.

Q. And that continued for some time, practically up until the time that she left the hospital, did it not?

A. Yes.

[fol. 820] Q. You were in the habit of leaving early in the evening, along about 7:45 or 8:00 or 8:15?

A. Yes.

Q. And after she left the hospital, you saw Mr. James upon several occasions, did you not?

A. Yes, I did.

Q. And you state that this letter, which has been marked

for identification, No. 50, you wrote that in your handwriting, is that right?

A. That is right.

Q. And Mr. James suggested to you the contents of the letter, is that right?

A. That is right.

Q. He, of course, did not dictate it word for word, did he?

A. No.

Q. He told you what he wanted in there and you wrote it out, isn't that the fact?

A. Yes.

Q. And he doesn't use very good English, does he, he is a man of very little education, as far as you know?

A. As far as I know; I don't know.

Q. Now, this particular letter here, No. 50 for identification, Mrs. Yarnell, this is not the only letter that you wrote for Mr. James, is it?

A. I believe I wrote several personal letters.

[fol. 821] Q. Yes. And you wrote at least some to his folks down in Alabama, did you not, some of his family?

A. I think I wrote one to his sister.

Q. And during the time that you wrote these letters, Mr. James told you he was quite nervous and would like to have you write the letters for him, isn't that true?

A. Yes, sir.

Q. And upon one occasion, he asked you if you would be kind enough to write a telegram for him, which you did, did you not?

A. Yes.

Q. Yes. Now, after Mrs. James had passed away, he left with her body, did he not?

A. Yes.

Q. He left on the same train, the train that was carrying her body, did he not?

A. Yes, I believe so.

Q. Well now, didn't you go down to the train to see him off?

A. I think we did, yes.

Q. Yes. And when you were down at the train to see him off, he thanked you for your many aids to him, did he not?

A. Yes.

Q. And did he give you some little expense money or some of the money that you had spent in the running around that you had done for him, don't you recall that?

[fol. 822] A. I believe he did.

Q. And he kissed you goodbye, didn't he, and told you you had been awfully nice to him in his trouble?

A. Yes, sir.

Q. And after that occurred, you came out here to California some time later, did you not?

A. Yes, sir.

Q. And one of the first persons whom you looked up out here in California was Mr. James, was it not?

A. No.

Q. Well, you did, however, see him?

A. Several months after.

Q. You went to see him, did you not?

A. No, he came over to the home of my aunt.

Q. Did you ever drop into the barber shop and see him?

A. He wasn't in the barber shop.

Q. And did you tell him that you were looking for employment?

A. No.

Q. You didn't discuss that with him?

A. No, sir.

Q. How long were you here?

A. I was here from the 18th of January until the 15th of July.

Q. And during that time you did seek some employment, did you not?

[fol. 823] Mr. Barnes: We submit that is not preliminary.

Mr. Parsons: Yes, that is preliminary.

The Court: It may be answered.

A. I went to school while I was here.

By Mr. Parsons:

Q. You are a stenographer, are you not?

A. Yes, sir.

Q. And isn't it a fact, that upon one occasion, you asked Mr. James, if by reason of the fact that he was operating a barber shop, operating a barber shop down town, if he didn't meet a lot of business men and that he could advise them to become interested in your behalf and attempt to get you some employment?

A. No.

[fol. 824] Q. Now, did you discuss that subject at all?

A. I said that if I could find a job out here, that I would like to stay out here.

Q. You did tell that to Mr. James, at least?

A. Yes, sir.

Mr. Parsons: That is all.

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Gerald Rogers, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Gerald Rogers.

Direct examination.

By Mr. Barnes:

Q. Mr. Rogers, your voice is quite soft, and will you use a little bit more power than you ordinarily use in talking, and talk a little louder, so that all of us may hear what you say. Your name is Gerald Rogers?

A. Yes, Gerald Rogers.

Q. I don't hear you?

A. Gerald Rogers.

Q. Are you related in any way to the other Mr. Rogers from Colorado, who came here and testified?

[fol. 825] A. No, sir.

Q. Just a coincidence of name, but no relationship?

A. Yes, sir.

Mr. Barnes: Now, the witness will have to talk very much louder for us to be able to hear him.

The Court: Yes, you will have to raise your voice, so that all the jurors can hear you.

By Mr. Barnes:

Q. Where do you live in Colorado?

A. Manitou Springs, Colorado.

Mr. Parsons: That is better; thank you.

By Mr. Barnes:

Q. Are you employed there, sir?
A. Yes, in Leonard's Grocery Store.
Q. I didn't get the name?
A. Leonard's Grocery Store.

Mr. Parson-: Leonard's?
Mr. Barnes: I got it the second time.

Q. Were you employed there in October, 1932?

Mr. Parsons: That is objected to on the ground it is immaterial.
The Court: Overruled.

A. Yes, sir.

By Mr. Barnes:

Q. You do not know this defendant when you see him?
A. Yes, sir.
Q. Do you know where the defendant lived in Manitou, on or about the 14th day of October, 1932?

[fol. 826] Mr. Parsons: That is objected to upon the ground that it is immaterial and irrelevant.
The Court: Overruled. You may answer.

A. Yes, sir.

By Mr. Barnes:

Q. Where was it?

Mr. Parsons: The same objection last stated.
The Court: The same ruling.

A. At the El Cajon Cottage, on Capitol Hill.

By Mr. Barnes:

Q. Were there any other cottages in the vicinity that were occupied?

Mr. Parsons: That is objected to as incompetent, irrelevant and immaterial, and it doesn't show that the witness knows, or has the means of knowing of the occupancy of other houses in that vicinity.
The Court: Overruled. You may answer.

A. About half a block.

By Mr. Barnes:

Q. The closest one was half a block, is that what you mean?

A. As well as I remember.

Mr. Parsons: The same objection.

The Court: Objection overruled.

By Mr. Barnes:

Q. Did you have a conversation with the defendant in the afternoon of October 14th, with reference to the subject matter of a grocery store?

Mr. Parsons: Just one moment. I object to that question upon the ground that it is irrelevant to the issues in this [fol. 827] cause, and does not establish any fact here.

The Court: Overruled. You may answer that "yes" or "no."

A. Yes.

Mr. Clark: Now, if your Honor please, I think the examination has gone so far that it will be necessary to make this specific objection to each and every question asked this witness concerning the defendant's statements, acts and conduct, as to the time to which the testimony relates. I think it would be necessary for me to make a similar objection to every question along the same line.

The Court: I take it that your objection basically is the same as that previously interposed to similar testimony, and particularly that interposed to conversations and declarations of Mr. James in Colorado.

Mr. Clark: Yes, your Honor, my thought being that all that was said and done there is irrelevant, and outside of the issues here.

The Court: That objection will be overruled, and it will be assumed that the same objection is made to each question, and the Court's ruling is the same as to each of the same objections.

Mr. Clark: If there should be any question for which a different reason might be urged for objecting, upon this or any other ground, we will call your Honor's attention to that.

The Court: And the Court reserves to itself the right to sustain the objection which is assumed to run here, if it

[fol. 828] should appear to the Court that the objection should be sustained, even without being specifically mentioned. You may proceed.

By Mr. Barnes:

Q. Tell us the conversation, Mr. Rogers.

A. I don't remember the exact words.

Q. Well, tell us the substance of it, then.

A. Mr. James ordered the groceries, and asked that they be delivered.

Q. Keep your voice up.

A. Mr. James ordered the groceries, and asked to have them delivered, and said he wanted to ride up with me when I delivered them.

Q. About what time of day was that conversation, approximately?

A. Somewhere around 5:00 o'clock.

Q. In the afternoon?

A. In the afternoon.

Q. And shortly after that conversation did you drive up to Mr. James' house with Mr. James in your truck?

A. Yes, sir.

Q. When you stopped the truck, both of you got out?

A. Yes, sir.

Q. Who carried the groceries?

A. I did.

Q. And where did you carry them?

A. In the front door, into the kitchen.

[fol. 829] Q. Are you familiar with the location of the rooms in the house?

A. Fairly, yes, sir.

Q. I am going to call your attention to a black board here, and so that if you draw anything, what you draw may be distinguished from what others may have drawn, I am going to take the liberty, Mr. Clark, of drawing a little square in the lower right-hand corner, as I face the black board, wherein this witness may draw. Will that be satisfactory, your Honor?

Mr. Clark: I have no objection, your Honor, to anything that the witness draws. The only objection I have is to the jury seeing what he draws.

The Court: Suppose you just draw a line right across separating the lower part of the board.

Mr. Clark: It will now be stipulated that a heavy crayon line has been drawn across the black board, and that everything upon the black board above that line there, with the exception of the letter "T"—I think that letter was on there at the start.

The Court: That letter "T" is painted upon the black board. It is a permanent fixture.

Mr. Clark: Everything above that line, except the letter "T" is a part of Exhibit 39 for identification, and that nothing may be placed upon the board below that line is a part of that exhibit.

[fol. 830] Mr. Barnes: That is stipulated. Do you believe, Mr. Rogers, that you can give us a rough drawing of the floor plan of that house? Could you do that?

A. I think so.

Q. Will you step down from the black board and do it, please? Make it as large as is convenient, in view of the size of the black board that you have to write upon.

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[fol. 831] By Mr. Barnes:

Q. What is this room that I am pointing to?

A. That is the front room, or living room.

Q. May we initial that "L.R." What is this room I am pointing to?

A. Dining room, I think.

Q. We will initial that "D.R." What is this room I am pointing to?

A. The kitchen.

Q. I will initial that "K." What is this room I am pointing to?

A. The bedroom.

Q. I will initial that "B.R." What is this room I am pointing to?

A. The closet, I think.

Q. I will initial that "Cl." What is this room I am pointing to?

A. The bathroom.

Q. I will write the word "Bath" in small letters in there. May I ask the jurors at the other end of the box if they can see the initialing and lettering?

A Juror: Yes.

Mr. Barnes: I call your attention to two parallel lines in the living room, intersecting the outer wall of the building. What do those parallel lines indicate in your drawing? [fol. 832]

A. The front door.

Q. I call your attention to two parallel lines in the partition between the living room and the bedroom. What do those parallel lines indicate?

A. The door.

Q. I call your attention to two parallel lines somewhat wider than the previous two, in the partition between the living room and the dining room. What do they indicate?

A. That is the big double doors.

Q. I call your attention to two parallel lines intersecting the partition between the dining room and the kitchen. What do they indicate?

A. The doors.

Q. Calling your attention to two parallel lines between the kitchen and the rear portion of the building, what do they indicate?

A. That is the door leading on to the back porch.

Q. There is a back porch, then, outside of this, and approximately where the word "rear" is written?

A. Yes, sir.

Q. Does that extend the length of the building, clear across, or just part way?

A. I couldn't say positively.

Q. I call your attention to two parallel lines between the bedroom and the bathroom in the partition. What does [fol. 833] that indicate?

A. The door.

Q. I call your attention to two other parallel lines between the kitchen and the bathroom, in the partition between those two rooms. What does that indicate?

A. The door.

Q. When you came in with the groceries that day, did you go in first, or did Mr. James, or do you recall?

A. Mr. James, as I remember.

Q. He preceded you in?

A. Yes, sir.

Q. Which way did he go when he entered—by the way, which door did he come in, the front or the rear?

A. We both came in the front door.

Q. I am going to stand back here, so we will be sure that you keep your voice up. Which way did Mr. James go when he went in that front door?

A. He went on into the bedroom.

Q. Will you point with the pointer to the path that he took?

(Witness indicates.)

Q. Which way did you go, as he went into the bedroom?

A. I went on through the dining room into the kitchen.

Mr. Parsons: What was that last answer?

Mr. Barnes: "I went on through the dining room into the kitchen." Did Mr. James call to any one when he went [fol. 834] in, that you heard?

A. I don't remember.

Q. Did you see Mr. James at any time in the kitchen?

A. Yes.

Q. Was that shortly after you had gone in there?

A. Yes, sir.

Q. Which way did he enter that kitchen?

A. He followed me on into the kitchen.

Q. Will you indicate on the drawing with your pointer the route by which he entered the kitchen?

A. I left Mr. James at this door, and went on into the kitchen.

Q. Yes.

A. And Mr. James followed me on into the kitchen afterwards.

Q. You are indicating there the route coming in from the dining room to the kitchen, with your pointer this way, are you not?

A. Yes, sir.

Q. When you saw Mr. James enter the door, then, he came through the door between the dining room and the kitchen?

A. Yes, sir.

[fol. 835] Q. Up to that time had you seen Mrs. James or her body?

A. I had seen Mrs. James through this door as I went through the other door with the groceries.

Q. I didn't understand you.

(Answer read by the reporter.)

Mr. Parsons: Let him indicate.

By Mr. Barnes:

Q. Will you indicate where Mrs. James was when you saw her?

A. She was on the bed in this room and as I went through this door into the kitchen I had seen her on the bed.

Q. I guess I didn't make myself clear. When you are speaking now of seeing Mrs. James on the bed, you mean on some other occasion, do you?

A. Yes.

Q. A day or two before that?

Mr. Clark: May I suggest that these questions are dangerously leading and suggestive.

The Court: Well, the questions might have been put in better form. However, they don't seem basically objectionable.

Mr. Clark: I don't want to seem too insistent, your Honor, but it has been four years——

Mr. Barnes: I will withdraw the question if there is any objection to it.

Mr. Clark: —since those things occurred and I think we should have the witness' own recollection without any sug-
[fol. 836] gestion that might be embodied in his testimony.

* * * * * * *

[fol. 837] By Mr. Barnes:

Q. Now, you said that you had seen Mrs. James in the bedroom on the bed at some time when you entered?

A. Yes, sir.

Q. State whether or not that was on the day of the last time when you went up with Mr. James with the groceries?

A. No, that was not on the last day.

Q. Now, my questions are directed entirely to the last day that you were there, entirely omitting any reference to what you may have done or seen delivering groceries at any other time, confine yourself now to the last day. Do I understand that on this last day you went directly into the kitchen with the groceries?

A. Yes, sir.

Q. And on that last day which way did Mr. James go?

A. He went into the bedroom.

Q. That is what you have been talking about?

[fol. 838] A. Yes, sir.

Q. And then when you saw Mr. James again on that last day, which way did he enter the kitchen?

A. From the dining room.

Q. Through the door indicated here in the partition between the dining room and the kitchen?

A. Yes, sir.

Q. Up to that time on that day, the last day, had you seen Mrs. James or her body that day?

A. No.

Q. Did you look in the bathroom at any time after Mr. James had entered the kitchen?

A. Mr. James opened the door to the bathroom.

Q. It was closed before that?

A. Yes.

Q. And after he opened the door, did you look in?

A. Mr. James called me and I went to the bathroom.

Q. And when you looked in the bathroom, what did you see?

A. I saw Mrs. James.

Q. Where was she?

A. Lying in the bathtub.

Q. Was water in the tub?

A. Yes, sir.

Q. About how much water in the tub was there?

A. Almost half full, I would say.

Q. Was Mrs. James clothed or naked?

[fol. 839] A. Naked.

Q. Describe the manner in which you saw her lying in the tub?

A. She was lying on her back.

Q. And at which end of the tub was her head?

A. At the end with the faucets.

Q. Where were her feet?

A. Over the rounding edge of the tub.

Q. By "the rounding edge of the tub" do you mean the opposite end to the faucets?

A. Yes, sir.

Q. Was she moving at the time you saw her or was she apparently dead?

A. Apparently dead.

Q. Did you do anything then?

A. Mr. James and I picked her up and carried her in and put her on the bed.

The Court: Pardon me, Mr. Barnes. Had you finished your examination as to the description of the appearance before Mrs. James was taken from the bathtub?

Mr. Barnes: Pardon me just a minute. Where was Mrs. James' face, with reference to the water in the tub?

A. About the surface of the water.

Q. About the surface of the water?

A. Yes, sir.

Q. Was her face directly up or sideways, or how was it?

[fol. 840] A. It was up and a little forward.

Q. Did you notice whether or not the water in the tub was about her mouth and nose?

A. Just b*ear*ly covering them.

Q. Were her eyes open or closed?

A. Open.

The Court: This might be a good place to take our recess. We will take a short recess at this time. The jury will heed the admonition heretofore given.

(Recess.)

(After recess.)

The Court: You may proceed. Let the record show all parties present.

Mr. Clark: If the Court please, counsel has shown me some photographs, concerning which, at my suggestion, he is about to make an offer as to what he expects to show, that I might have the benefit of my objection and your Honor's ruling and so that it will be done expeditiously——

Mr. Barnes: Yes, I have here five photographs, which I hold in my hand which I will ask to be marked as 51.

The Court: 52, Mr. Barnes.

Mr. Barnes: 52, that is correct; 53, 54, 55 and 56, and with respect to these photographs being so numbered, I will state that they were made in the month of June by a photographer from Manitou in the presence of Mr. Jack Southard of the District Attorney's office and were taken by [fol. 841] his request and they are pictures of the outside and the interior of the house about which this witness has been testifying.

Mr. Clark: And you are offering them in evidence in connection with this witness's testimony?

Mr. Barnes: Yes, I am having them marked for identi-

fication. This witness will not identify one of these pictures. There will be other witnesses who will identify them.

Mr. Clark: Are you going to use one of them in connection with the testimony of this witness?

Mr. Barnes: I am going to use four of them.

Mr. Clark: It seems to me that it would be necessary to lay the foundation for the photographs first by introducing——

The Court: The first examination will be, of course, as to the question of admissibility.

Mr. Barnes: That is what I had intended to do. We haven't had the benefit of the witness's testimony on that subject, but counsel has requested that I state the time and circumstances of their taking.

Mr. Clark: There is no objection to them at this time, but I hope the witness on the stand will know, that after they are shown to him, I may make a specific objection.

Mr. Barnes: There is one that I will not show this witness, that is People's offer 52, and the other four I will.

Mr. Clark: Go ahead, I will stand around here by you.

Mr. Barnes: I will be glad to have you. I will show you People's Exhibit offer 56 for identification. Do you recog-[fol. 842] nize the portion of the house, the portion of the outside of the house shown in that picture?

A. Yes, sir.

Q. Is that a fair representation of the appearance of that house in October, 1932?

A. Yes, sir.

Q. Is that the house about which you have been testifying in which you saw the body of Mrs. James in the bathtub?

A. Yes, sir.

Q. I call your attention now to People's offer 55 for identification. I will ask you to state what that is.

Mr. Clark: Just one moment, that is objected to upon the ground that the evidence is incompetent.

The Court: The objection is overruled. There may be some criticism to that form of the question. However, you may answer it.

A. That shows a portion of the front room and the dining room.

Mr. Barnes: Is that a fair representation of the location of the rooms and the partitions, not with respect to the furniture, but with respect to the location of the rooms and the

partitions and doorways as it existed in October, 1932 in that house about which you have spoken?

Mr. Clark: That is objected to upon the ground that the evidence is incompetent, and calls for an opinion or a conclusion which it is not shown that he is qualified to express [fol. 843] and there is no foundation laid for its introduction by any showing that the photographs were accurately taken or that there has been no photographic device used to render them misleading, and that a foundation has not been laid in another respect, namely, that it has not been shown that the conditions as depicted in the photographs now are all the same as they were at the time to which this testimony relates.

The Court: Objection overruled.

Mr. Barnes: Will you read the question, please?

(Question read by the reporter.)

A. Yes, sir.

By Mr. Barnes:

Q. I call your attention now to People's offer 53 for identification. I will ask you to state whether or not that is a fair representation of the bathtub and the corner of the bathroom where the tub lies in the house about which you have testified on or about the 14th day of October, 1932?

Mr. Clark: That is objected to upon the same grounds and all of the grounds last stated.

The Court: Overruled.

A. As far as I can see, it is the same.

By Mr. Barnes:

Q. I call your attention now to another photograph showing in the lower lefthand corner a portion of a bathtub, in the center an open doorway, a window and a portion of a bed. [fol. 844] Leaving out of consideration in this question the location of the bed, and the portion of the chair, state whether or not the tub and the doorway and the location of the room appear to be shown here as a fair representation as that same scene was on or about October 14th, 1932?

Mr. Clark: That is objected to upon all of the grounds last stated, and it is objected to upon the additional ground that it is an attempt to lay a foundation for the introduction of

the picture by showing that some, but not all of the things depicted there are the same as the things were at the time to which the testimony relates.

The Court: Overruled.

A. Yes, sir, as nearly as I can say.

By Mr. Barnes:

Q. Was there a wash basin in the bathroom when you saw it on the 14th of October, 1932?

A. I don't remember. There probably was, I don't remember.

Q. Calling your attention now to People's offer 55 again, the one wherein there is a picture showing two doorways, state, if you will, what room the doorway on the left leads into?

A. This one?

Q. That is on the left, sir, yes.

A. That leads into the bedroom.

Q. And state what room the doorway on the right leads into.

[fol. 845] A. Into the kitchen.

Q. What is shown in the foreground of that picture I have just shown you, what rooms?

Mr. Clark: That is objected to upon the grounds last stated, and on the additional ground that it is secondary, incompetent, and not the best evidence.

The Court: Overruled.

A. On the left is the front room, and the right, the dining room.

Mr. Barnes: By the right you mean that portion of the room shown the other side of a pillar that appears in the picture?

A. Yes, sir.

Q. And going now to the scene that you saw when you looked into the bathroom when you saw Mrs. James' body in the tub, state whether or not her hips were on the bottom of the tub?

A. Yes, sir.

Q. Were her shoulders on the bottom of the tub?

A. Yes, sir.

Q. I couldn't hear.

A. Yes.

Q. How close to the end of the tub where the faucets were was her head?

A. I couldn't say positively. More to the side of the faucets, right close.

[fol. 846] Q. State whether or not the portion of the back between the shoulders and the hips seemed to be flat on the bottom of the tub?

A. I couldn't say.

Mr. Barnes: Cross examine.

Cross examination.

By Mr. Clark:

Q. Pardon me, Mr. Rogers, but how old are you now?

A. 28 years old.

Q. You were then about 24 years old at the time you are talking about, is that right?

A. Something like that.

Q. And the town of Manitou is about how large?

A. About 1000 population.

Q. I beg your pardon.

A. Around 1000 population.

Q. It formerly was known as Manitou Springs, was it not?

A. No, sir, it is known as Manitou Springs, now.

Q. Do you know the elevation approximately?

A. 7000 and something.

Q. It is essentially a summer resort, is it not?

A. Essentially, yes.

Q. And a considerable number of houses have been built there for the purpose of renting to summer visitors?

A. Yes, sir.

[fol. 847] Q. So that the population is very much greater in the summer time than during the rest of the year?

A. Yes, sir.

Q. That also is true, is it not?

A. Yes, sir.

Q. The summer season is pretty much over by September, is it not?

A. Yes, sir.

Q. By that time a considerable number of the houses have become vacant?

A. Yes, sir.

Q. Now, it is also true, is it not, that it is a region in which there is considerable wind during the fall months?

A. Not necessarily; sometimes.

Q. Do you remember how it was with respect to that, during the fall of 1932?

A. No, sir.

Q. About when did you first see Mr. James, as nearly as you can remember?

A. A few days before Mrs. James was found.

Q. And you first saw him at Leonard's Grocery Store, did you not?

A. Yes, sir.

Q. Am I correct in my understanding that that store is almost directly across the street from the post office?

A. Almost direct, and a little east.

[fol. 848] Q. It was the usual thing during your acquaintance with Mr. James, was it not, for him to go to the post office for his mail and get his groceries at the same time?

A. Well, as far as I know. I don't know about his mail.

Q. By the way, this is—may I have that photograph? Manitou is situated along a canyon, is it not?

A. Yes, part of it on the side of the hill.

Q. What would you say is the character of the ground where the house is shown in this photograph, marked Exhibit 56?

A. The house sits almost on top of it.

Q. And when Mr. James ordered any considerable canned goods or groceries, he had them delivered, didn't he?

A. Yes, sir.

Q. And it occurred on one or two occasions that he rode up with the delivery, didn't he?

A. Yes, sir.

Q. Now—I imagine that the cross examination will be very brief—Directing your attention to the tub shown in Exhibit 53, does that look to you like the same tub that you saw in 1932 in that house?

A. Yes, as far as I know.

Q. Of course, whether it is the same tub, the tub that was in there was taken out?

A. No.

Q. But it was a tub of the same size and character as far [fol. 849] as your faculties serve you?

A. Yes, sir.

Q. How long would you say that the tub was, there in October, 1932?

A. I don't know the exact length.

Q. Would you be prepared to say about four feet?

A. I would think so.

Q. And was that a metal tub, enameled over or a porcelain tub?

A. I couldn't say.

Q. Well, at any rate, the tub was smooth and white?

A. Yes.

Q. Now, I wonder if you would oblige me, Mr. Rogers, by taking this little piece of crayon and drawing a white line to designate the route that you took on this occasion from the time you entered the house until you entered the bathroom?

[fol. 850] A. Do you mean draw it here?

Q. Yes, will you be kind enough?

(Witness indicates.)

Q. Now, you have stopped in the kitchen. You went on from the kitchen into the bathroom, didn't you?

A. Yes, sir after Mr. James came.

Mr. Barnes: We can't hear the witness?

Mr. Clark: "Yes, after Mr. James came." I am going to ask you presently to draw a line indicating the route taken by Mr. James. Now, leaving a break there to indicate that you stopped for a time in the kitchen, will you draw another line showing the route you pursued from the kitchen to the bathroom?

(Witness draws.)

Q. I think you may be seated, now. Thank you.

Mr. William: May we, for the purpose of the record, have that line marked "A" at the beginning, and "B" at the end?

Mr. Clark: That is supposed to be an "A". It is really a triangle. It was intended for an "A", and the end in the bathroom has been designated with the letter "B".

Mr. Barnes: May I make one suggestion, also, that you retrace the line, Mr. Clark, a little heavier. It is almost impossible to see it from this end of the jury box.

Mr. Clark: That is all right, Mr. Barnes. I thank you for the suggestion. May I make a counter-suggestion, that we [fol. 851] wait a few moments for that. I assure you it will be done before the witness leaves the stand.

Q. Now, from the lines you have drawn I infer that there was a door between the kitchen and the bathroom?

A. Yes, sir.

Q. And you went through that door in order to gain access to the bathroom?

A. Yes, sir.

Q. Before you did that, however, you had seen Mr. James enter the bathroom?

A. Yes sir.

Mr. Clark: Has not your Honor a red pencil?

The Court: I was just wondering about the advisability of using a pencil on the black board?

Mr. Clark: A colored crayon would be better, I think. Perhaps we may be able to secure some during the noon recess. I am sure the examination will extend beyond the noon recess.

The Court: If not, you may duplicate our school days' experience, and dip a piece of white chalk in red ink.

Mr. Clark: I might say that that is a device I never resorted to, your Honor.

Q. Now, the bathroom, as I have its location in mind, was located between the kitchen and the bedroom, is that correct?

A. Yes, sir.

Q. Now, did this house front toward the south, east, north [fol. 852] or west?

A. South, as nearly as I can tell.

Q. And during that season the prevailing wind blows down the canyon, does it not?

A. Sometimes; not always.

Q. Well, you have more wind at that season blowing from west to east than from any other direction, have you not?

A. I really don't know.

Q. Well, now, with regard to the kitchen, it, of course, had windows?

A. Yes, sir.

Q. You haven't designated any of those windows in this drawing, have you?

A. No, sir.

Q. Would you be kind enough to take the pointer and point as nearly as you can to where the windows in the kitchen were located?

A. On this side of the room; I don't know exactly where.

Q. And by "this side of the room" you are referring to the extreme left-hand side of the drawing?

A. Yes, sir.

Q. Now, did you notice about what the height of the bottom of the windows, the kitchen windows, was from the ground?

A. I didn't notice.

Q. Well, the kitchen was equipped with a sink, and drain-board, was it not?

[fol. 853] A. I think so.

Q. And the windows were located above that, weren't they?

A. I think so.

Q. And the sink was about as high as the railing of the witness box, that is, the top of the drain-board was about as high as the top of the witness box in which you are now sitting, wasn't it?

A. Well, not quite.

Q. Do you think an inch or two less than that?

A. Yes, sir.

Q. Now, was there one window, or two windows there?

A. If I remember right, there were two small windows.

Q. And upon this day in October, did you notice whether those windows were open?

A. No, sir.

Q. You don't know?

A. No, I don't.

Q. You do know that during that afternoon there was a good strong breeze blowing, don't you?

A. I don't remember.

Q. That was the common thing in afternoons in that season, wasn't it?

A. Not common, but sometimes.

Q. Didn't you almost always have a cool breeze blowing along about half past 3:00, or 4:00 o'clock?

A. That is true.

[fol. 854] Q. Now, you, of course, were expecting to see a woman in that house when you went in there on this occasion?

A. No, sir.

Q. You had seen her there upon other visits?

A. I had seen her once.

Q. You weren't, anyway, expecting to see a dead woman?

A. No, sir.

Q. You were somewhat shocked to find that there was a dead woman in the house?

A. Yes, sir.

Q. You felt considerably excited by that dis*d*overy, didn't you?

A. Yes, sir.

Q. And you didn't, under the influence of that shock, and during that excitement, make very careful observations of the conditions that you then saw, did you?

A. No, sir.

Q. Now, as a matter of fact, you never did notice how deep the water was in the bath tub, did you?

A. Well, it was up around her face.

Q. Now, referring again to the tub, the tub had an outlet for water slightly below the faucets, didn't it, so that when the tub became so full the water would automatically flow out? Isn't that the way the tub was arranged.

A. Yes.

Q. Did you notice how near the water was up to that [fol. 855] place for it to flow out?

A. No, sir.

Q. Did you notice whether or not the water was soapy?

A. Yes.

Q. It was?

A. It was soapy.

Q. And did you see anything of a package of soap flakes in that bathroom?

A. I don't remember.

Q. How long was it, as nearly as you can tell us, after you entered the house before you put your hand upon some portion of the body of this woman?

A. I don't remember; only a few minutes; a very short time.

Q. And when you did put your hands on the body of the woman it felt slippery from the soapy water, didn't it?

A. Yes, sir.

Q. And it also felt quite warm, didn't it?

A. Yes, sir.

Q. There was some conversation occurred there between you and Mr. James as to whether life was extinct, or not, was there not?

A. There probably was; I don't remember.

Q. Now, you were then about the same size you are now, I take it?

A. I think so, about the same, yes.

[fol. 856] Q. You weigh about how much?

A. About 135.

Q. And you and Mr. James carried this woman from the bathroom to the bedroom, didn't you?

A. Yes, sir.

Q. And you carried about the equal part of h r weight as that carried by Mr. James?

A. I carried her under the knees, and he carried her under the shoulders.

Q. And as you carried her, did you go through the doorway leading to the bedroom first, or did Mr. James?

A. Her feet was toward that door, so I imagine I did; I don't know.

Q. About how far was that house from the grocery store?

A. About a mile; one mile.

Q. Now, you spoke about a block. You have no ordinary blocks in Manitou, have you?

A. Well, it is really not in blocks.

Q. Well, at any rate, the other house, in proximity to this one you spoke of, was distant about 150 feet, was it not?

A. Well, there were houses nearby.

Q. Quite a number of them, weren't there?

A. Yes.

Q. This house that Mr. James was occupying was not isolated away off by itself, was it?

[fol. 857] A. No, sir.

Q. And the other houses that you speak of, were some of them vacant and some of them occupied? Weren't they?

A. Yes, sir.

Q. Now, one detail that I am not clear in regard to, Mr. Rogers: When Mr. James entered the bathroom, did he go back out into the kitchen, or did he remain in the bathroom until you came?

A. Well, he stepped back into the kitchen?

Q. And you followed him into the bathroom?

A. Yes.

Q. When you got there he had the body of Mrs. James in his arms, did he not?

A. No, sir, not yet.

Q. I beg your pardon?

A. No, sir.

Q. It was lying in the tub?

A. In the tub.

Q. You don't know whether Mr. James had had hold of her before you came in or not, do you?

A. No, sir.

Q. Well, Mr. James went directly to the tub and took hold of her body, did he not?

A. I think so.

Q. So that it was only a matter of seconds that you saw her body in the water, before Mr. James raised it up, that is [fol. 858] true, isn't it?

A. Yes, sir.

Q. And all the observations that you made as to how her body was lying there, and how much of her head was under water, was during just those seconds, that is also true, isn't it?

A. Yes, sir.

Q. Do you still live at Manitou?

A. Yes, sir.

Q. You have at this time no business in Los Angeles, other than testifying in this case, have you?

A. No, sir.

Q. You came down here for the express purpose of giving your testimony?

A. Yes, sir.

Q. You were employed by the District Attorney's office to do that?

A. I was asked to come.

Q. Well, you were promised compensation for coming, were you not?

A. My expenses.

Q. You have received some money on account of expenses, haven't you?

A. I received money for eating money, and to get here.

Q. And you expect to receive more money, don't you?

A. My expenses back.

[fol. 859] Mr. Clark: If your Honor please, the usual hour of adjournment has arrived, and the cross examination will not be very extensive.

The Court: We will take our recess at this time, ladies and gentlemen of the jury. You will heed the admonition heretofore given. The audience will remain seated until the jury has retired.

(Whereupon, a recess was taken until two o'clock p. m.)

[fol. 860] Thursday, July 2nd, 1936; Afternoon session, 2 o'clock P. M.

The Court: Let the record show all parties present. Mr. Rogers, please.

GERALD ROGERS, resumed the stand and testified as follows:

Cross-examination (Continued).

By Mr. Clark:

Q. Mr. Rogers, you didn't see from what direction Mr. James came into the store on that last occasion, did you?

A. Well, there is only one way to come in.

Q. You mean that there is no street extending above and below the store?

A. There is no street in back.

Q. Well, the store in front, you didn't see whether he came down hill or up hill?

A. No, sir.

Q. Now, you don't know whether he came from Colorado Springs or not, do you?

A. No, sir.

Q. And you don't know whether he had been at his residence at any time that afternoon or not, do you?

A. No, sir.

Q. He made no statement to you as to when he had last been at his residence, did he?

[fol. 861] A. I don't remember.

Q. Now, in carrying this woman from the bathroom to the bedroom, in order to avoid dropping her, you used both arms and hands, didn't you?

A. I used both hands under knees.

Q. And kept hold of her with both arms from the time you first picked her up until the time you laid her down on the bed?

A. Yes, sir.

Q. She was rather a large woman, wasn't she?

A. As I remember it, yes.

Q. You would estimate she would weigh around 150 or 160 pounds or more, wouldn't you?

A. I don't know.

Mr. Clark: That is all.

Redirect examination.

By Mr. Barnes:

Q. Just one or two questions. Are you a married man?
A. Yes.
Q. How long have you been married?
A. About seven years.
Q. With respect to this water in the bathtub when you reached in to get your part of the body to carry it, did you put your hands in the water?
A. Some, yes.
Q. Was it cold water?
[fols. 862-863] A. No.
Q. Was it hot water?
A. No.
Q. How would you describe it, lukewarm?
A. I suppose so.

Mr. Barnes: That is all.

The Court: Did you notice at the time when Mr. James came into the kitchen, that is, before you went into the bathroom, whether his clothing was wet or dry?
A. I didn't notice.
Q. Did you notice whether his sleeves were rolled up or not?
A. I don't remember.

Recross-examination.

By Mr. Clark:

Q. Was he in his shirtsleeves wearing a coat?
A. I don't remember.

* * * * * * *

[fol. 864] Doctor George B. Gilmore, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.
The Witness: Dr. George B. Gilmore.

Direct examination.

By Mr. Barnes:

Q. What is your residence, Doctor?

A. Colorado Springs, Colorado.

Q. What is your business?

A. Physician.

Q. Are you practicing your profession in Colorado at the present time?

A. Yes, sir.

Q. And how long have you been practicing there, Dr. Gilmore?

[fol. 865] A. 32 years.

Q. And at the present time you are in the private practice of medicine?

A. Yes, sir.

Q. At the present time you hold no official position? You have come here as a witness at the request of the prosecution of the People of the State of California, in this case?

A. Yes, sir.

Q. State to the Court and jury what, if anything, you have received or expect to receive for coming here.

A. They agreed to take care of my expense coming out and expenses while here and a small per diem while I am away from home.

Q. That is to compensate you for less than you would make in your professional work?

A. Yes.

Q. It would not thoroughly compensate you?

A. Well, I think not.

Q. Now, in the year 1932, on the 14th day of October, did you go to Manitou to see the remains of a lady?

A. I did.

Q. And when you got to that house, did you see Mr. James?

A. Yes, sir.

Q. At that time, as I understand it, you were the coroner?

A. Yes, in El Paso County.

[fol. 866] Q. And Colorado Springs is in the center of El Paso County?

A. The County Seat.

Q. The County Seat, I should say?

A. Yes.

Q. When you arrived there did you see a lady in the house?

A. Yes, sir.

Q. A deceased lady?

A. I did.

Q. And where was she?

A. She was in the bed, lying in the bed in the bedroom.

Q. Did you talk to the defendant——

Mr. Clark: Just one moment. Go ahead and finish.

By Mr. Barnes:

Q. —about that lady that you saw there?

Mr. Clark: We object on the ground it calls for evidence that is irrelevant and incompetent.

The Court: Overruled; you may answer, Doctor.

A. I did.

By Mr. Barnes:

Q. I will call your attention to People's Exhibit 49 for identification and two persons in and upon an ink circle shown in this picture, to which I am now pointing. Do you recognize the gentleman there?

A. Mr. James.

Q. And do you recognize the lady?

A. In a general way I would say that resembles her.

Q. That is the lady you saw dead in the house there, [fol. 867] where you saw Mr. James?

A. Yes, sir.

Q. Did you talk to Mr. James about the lady that you identified in this picture?

Mr. Clark: That is objected to on the ground that it is incompetent, irrelevant and immaterial.

The Court: Overruled; you may answer.

A. I did.

Mr. Clark: It is apparent, if your Honor please, that at this time that we will wish to object at all times to such subject matter which, according to our conception of the law, has no place in the record, and I think, your Honor, has a different view, and that your Honor would overruled

the objections if they were made and it is not our desire to delay the progress of the trial.

The Court: You can make a general objection and I will consider all your objections as made upon the same ground.

Mr. Clark: Yes, your Honor.

The Court: The objection is overruled. The objection is the same as made by Mr. Clark concerning the general testimony and also relating to the conversation with Mr. James. The objection is overruled.

By Mr. Barnes:

Q. State the conversation you had with the gentleman, Mr. James.

A. Well, he told me that he had gone to Colorado Springs during the day to consult with an insurance company there [fol. 868] in regard to a change he was negotiating on an insurance policy, and he had expected to find some mail at this office, I believe, that had arrived in the morning, but the mail had failed to arrive in the morning, and he waited over for the afternoon mail to get into this office in regard to the loan that he was negotiating. So that he had been away from the home in Manitou for several hours, and that he had returned to Manitou and made the purchase of some groceries which he had delivered to his house in Manitou, and in going into his house, he didn't find his wife and didn't see her in the bedroom, he had then looked into the bathroom and found that she was in the bathtub. This delivery man from the grocery store was in the house at the time, and the two of them took her from this tub of water and put her on the bed in the bedroom.

[fol. 869] Q. Did he say whether or not the water was still in the bath tub?

A. Yes, there was water in the bath tub when I arrived, and he told me that was the water that had been there when the body had been removed.

Q. Did you look at it, and touch it?

A. I did.

Q. Describe what you found?

A. The water was rather soapy. The bathtub was perhaps a third full at that time, as I remember it, and was rather luke warm in character.

Q. Was there anything said about soap?

A. Yes, he remarked that he had found out of its posi-

tion—it seems to me he said that he found this Ivory Soap carton on the kitchen table, or perhaps the drain board in the kitchen, and presumed that some of these soap flakes had been put into the tub of water after the water had been put in the tub.

Q. Did he say anything about washing?

A. Yes, he then told me, or later, while I was there, he told me—I am not certain as to the exact sequence of these events—he told me about this accident, this head injury that she had sustained on a previous occasion, about her having been in the hospital, and about while she was in the hospital, prior to her leaving the hospital, she had been [fol. 870] requesting the doctor and the nurses that she might have her head shampooed, her hair; that this had been repeatedly refused by the doctor, and, of course, not carried out at her request by the nurses, and that since she had gone to this cottage in Manitou a few days previously, she had been wanting Mr. James to shampoo her hair, which he had refused to do.

Q. Did he tell you why he had refused to do so?

A. Because the Doctor had ordered that her hair be not washed. I don't remember whether he told me any reason that the doctor had given for that, or not. Then he went on to say——

Mr. Clark: Just a moment. May I have that answer read?

(Answer read by the reporter.)

Mr. Clark: Thank you. I was under a misapprehension as to what the answer was.

Mr. Barnes: Proceed, Doctor.

A. He then told me that when he left the house to go to Colorado Springs that she was in bed, and that she had, of course, been instructed to stay in bed, and that his assumption was that in view of the fact that she had been wishing to have her hair shampooed that she took advantage of his absence, being there in the house alone, and had gotten up out of bed, gone into the bathroom, and ran the water in the tub, put the Ivory Flakes in it, and that her body was unclothed when he came in, and her night gown was in the [fol. 871] bathroom in one corner of the room, and that the body had been found in the tub, and that Mr. Rogers was in the house, and they, together, had taken the body from the tub and put it on the bed.

Q. Did you say anything to Mr. James with reference to the question of autopsy?

A. Yes, I told Mr. James that I thought it would be a good plan to have an autopsy on this body, so that we might better know exactly what had been the cause of death. To this statement he said that he just couldn't permit anything of the so[illegible], and much preferred that I wouldn't have the autopsy.

Q. As I understand it, in Colorado unless a Coroner's Jury orders an autopsy, the County Coroner can't have it on his own volition, is that the situation?

Mr. Clark: Just one moment. That is objected to upon the ground that it calls for the opinion of the witness upon a question of law, and it has not been shown that he is competent to express such an opinion, and that the evidence is incompetent.

The Court: I think that all that is necessary is for counsel to call the Court's attention to the provision of law, with which I am not off hand familiar, but of which I would take judicial knowledge. I think that while technically I could hear the testimony to acquire the information on which I could take judicial knowledge, while I think the [fol. 872] objection could be circumvented, I have no desire to do so. Objection sustained.

By Mr. Barnes:

Q. After this occasion did you receive from any person a letter in regard to this matter?

Mr. Clark: We think that that is irrelevant for other reasons. The objection that it is incompetent and irrelevant covers it.

The Court: It is obviously merely preliminary, and nothing in the question to indicate either way. Assuming that the question is asked by counsel in good faith, the objection is overruled.

A. I did.

By Mr. Barnes:

Q. From whom did you get the letter?

Mr. Clark: Just a moment. That is objected to upon the ground that it is incompetent, irrelevant and immaterial, and calls for the opinion of the witness.

Mr. Barnes: I will withdraw it, and reframe it.

The Court: I think the latter portion of the objection is good.

Mr. Barnes: I will withdraw it.

Q. Was the letter delivered to you by some person?

Mr. Clark: That is objected to upon the ground that it is immaterial, and there are other grounds of its irrelevancy, other than those stated in the general objection.

The Court: The objection will be overruled.

A. It was.

[fol. 873] By Mr. Barnes:

Q. Have you the letter now?

A. Yes, sir.

Q. May I see it? May I have the envelope, also?

(Witness hands documents to Mr. Barnes.)

Mr. Barnes: Thank you.

The Court: It will be marked 57 for identification.

Mr. Barnes: There are two separate pieces of paper, your Honor.

The Court: I think we will mark them both as one exhibit.

Mr. Barnes: And an envelope. May we have them all marked as one exhibit?

The Court: Yes.

By Mr. Barnes:

Q. From whom did you receive this People's offer—57, is it, your Honor?

The Court: Yes, 57.

A. From Dr. Hanford.

The Court: Dr. Hanson, H-a-n-s-o-n?

A. Hanford, H-a-n-f-o-r-d.

Mr. Barnes: May I pin these two pieces and the envelope together, your Honor?

The Court: Yes.

Mr. Barnes: Have you a pin, Mr. Clerk? (Papers attached together by Clerk.)

Q. Who is Dr. Hanford?
A. He is a physician.
Q. Is he a physician in Colorado?
[fol. 874] A. Yes, sir.
Q. Likewise practicing in Colorado Springs?
A. Yes, sir.

Mr. Clark: We will stipulate.
Mr. Barnes: Counsel have kindly offered to stipulate, your Honor, that with respect to the smaller sheet of the two, upon which there is typewriting, contained in People's offer 57, that the signature "Robert S. James", was that of the defendant.
Mr. Clark: Yes, so stipulated.
The Court: So stipulated, genelemen?
Mr. Silverman: Yes, so stipulated.
The Court: And you accept, Mr. Barnes?
Mr. Barnes: We accept.
The Court: The record will so show.

By Mr. Barnes:

Q. After receiving People's offer 57, did you make any change in the death certificate?
A. I did.
Q. And after making the change, did you send copies anywhere?
A. I took two copies to the Registrar's office in Manitou, that being the place where the person had died, and then I sent, as requested in this letter, three or four copies to Mr. James in California.
Q. Through the United States Mail?
A. Yes, sir.
[fol. 875] Q. In a letter addressed to him? and deposited in the mail?
A. Yes, and by Air Mail, I believe.

Mr. Barnes: At this time we offer the Exhibit 57 in evidence.
The Court: May I see it, first, for a moment?
Mr. Clark: In addition to our general objection, we make further objection that no foundation has been laid in this, that it appears from an inspection of it that it is a part of the general correspondence, and correspondence not ac-

ceptable to us, and I think it is incompetent. Now, for other reasons, we impress the general objection.

(The Court thereupon examined Exhibit 57.)

The Court: The objection is overruled. It will be marked 57 in evidence.

Mr. Barnes: May I read it to the jury at this time?

The Court: You may do so.

Mr. Barnes: (Reading): "Los Angeles, Cal., October 21st, 1932. Swan Funeral Home, 316 N. Tejon, Colorado Springs, Colo. Gentlemen: After looking over my insurance papers I find that the company may not pay for accidental drowning. I wish you would get in touch with Dr. Hanford and assist him in having the coroner's certificate changed. I am sending you copy of the letter which I have sent to the doctor so you will know what I have told him. Thanking you in advance for your courtesy, I am Yours [fol. 876] very truly, Robert S. James. Robert S. James, 857 S. Grand Ave., Los Angeles, Calif.", which signature in pen and ink is the one to which we stipulated a moment ago as having been in the defendant's handwriting. (Continuing reading):

"Los Angeles, Calif., October 21, 1932. Dr. P. O. Hanford, 720 N. Nevada, Colorado Springs, Colo. Dear Dr. Hanford:

"In going through the insurance papers we find that there is a clause which relieves the company from paying for accidental drowning except it is directly caused by another accident which we all know was true in this case, if she was drowned.

"The Coroner's decision as it now stands may make it impossible for us to collect the insurance with which we had expected to pay our bills but we are told that if the real cause of this accident is told in the death certificate we will have no difficulty in collecting and have been advised to have this cause stated.

"We know you will do everything you can for us and wonder if you could have this verdict changed or add the words 'caused by cerebral hemorrhage' or words to that effect.

"We surely appreciate everything you have done, Doctor, and trust you will do everything in your power to get this fixed up immediately and send us corrected death certificate.

Whatever expense there may be to you in getting this fixed [fol. 877] up, if any, we will be glad to pay.

"We expect a quick settlement but owing to the incomplete statement on the death certificate we are told there is apt to be delay unless this is completed before the claim is sent in. We are sending this by air mail and will appreciate your returning it the same way at your very earliest possibility.

"It will be necessary for us to have four of these certificates and to have the original report changed in Manitou. We are returning one copy as a sample. We claim that her death was directly caused by her serious injury in the automobile accident. Sincerely yours, Blank", and then, "Robert S. James", in typewriting, not handwriting, "857 S. Grand Ave., Los Angeles, Calif.

"P. S. Please change the name of my wife from Winona P. James to Nona P. James on the death certificates which you are sending us and on the record in Manitou as Nona is the name under which she was christened. There was another error on the death certificate as her father's name is Halbert C. Wallace instead of Holbert C. Wally."

By Mr. Barnes:

Q. I show you People's offer 56 for identification. Do you recognize that as a fair representation of the outside appearance of that house in which you found the body of Mrs. James?

A. I didn't see the front of the house.

Q. Well, you went in the back of the house, didn't you? [fol. 878] A. I went in the back door. The back door of this cottage is nearer to the road where I parked my car, so I went in the back door, and when I left the house I went out the back door. I didn't see the front of the house.

Q. I call your attention to People's offer 53, where there is a bath tub shown. Is that a fair representation of the bath tub that you saw there on that occasion?

A. I think it is.

Q. I call your attention to People's offer 52, which is a picture of a wash basin. Was such a wash basin as is shown in that picture there at the time you made this trip to see this body?

A. There was.

Q. And is that a fair representation of the appearance of that wash basin as it appeared on the 14th of October, 1932?

A. It is.

Q. I show you another picture marked People's offer 54 for identification, which shows a portion of the bathroom, and a portion of the bedroom. Is that a fair representation of what it purports to show?

A. It is.

Q. Likewise, I show you People's offer 55 for identification, showing a portion of the living room, and dining room, and the two doorways leading into the bedroom, and the kitchen. Is that a fair representation of what it purports to show?

A. It is.

[fol. 879] Q. And these pictures that I have shown you that you do recognize, fairly represent the conditions as they existed in October, 1932?

A. Yes, sir.

Mr. Barnes: Cross examine.

Cross-examination.

By Mr. Parsons:

Q. Doctor, about what time of day was it when you arrived?

A. Right about 6 o'clock in the afternoon.

Q. In the evening?

A. Yes, sir.

Q. And was Mr. James there at the house when you arrived?

A. He was.

Q. And at the time that you had this conversation with Mr. James and you obtained from him certain information, did he frankly and freely answer your questions?

Mr. Barnes: That is objected to as calling for a conclusion.

The Court: Sustained.

By Mr. Parsons:

Q. Did he unhesitatingly answer your questions?

Mr. Barnes: The same objection.

The Court: Same ruling.

By Mr. Parsons:

Q. At the time that he answered your questions at the time you put the questions to him, did he promptly reply? [fol. 880] A. He did.

Q. And at the time that you reported this matter to the press, isn't it a fact, that when it was first reported it was reported that the contributing cause of death was cerebral hemorrhage?

A. I don't think I reported it to the press in the first place.

Q. Well——

A. And I don't remember of hearing anything about cerebral hemorrhage in this case until this letter was handed to me.

Q. And was there some report made by the officials in attendance or the doctors in attendance at or immediately subsequent to the time of learning of her death that she had cerebral hemorrhage as one of the contributing causes of death?

Mr. Barnes: That is objected to on the ground that the question is indefinite and not proper cross examination.

Mr. Parsons: Strike it.

Q. Was there any report given out by the attending physician of this woman shortly after her death, that cerebral hemorrhage was a contributing factor contributing to her death?

Mr. Barnes: That is objected to on the ground that it is hearsay.

[fol. 881] The Court: I think, in view of all the surrounding circumstances that I will permit the answer. You may answer, Doctor, if you know.

A. It was not reported to me that way.

By Mr. Parsons:

Q. Well, Doctor Hanford eventually indicated, did he not, that cerebral hemorrhage was actually one of the contributing factors of her death?

A. Not to my knowledge.

Q. Not to your knowledge?

A. No, sir.

Q. And now was the death certificate changed to indicate cerebral hemorrhage was a contributing cause of death?

A. No, sir.

Q. And what did the death certificate show as the cause of death?

A. The primary cause was given as accidental drowning, and contributing cause was given as skull fracture and head injury sustained on September 21st, I believe was the date, in other words, at the time of her injury in the automobile.

Q. Now, who made out that certificate in the form that you have told us that it was made?

A. The death certificate?

Q. Yes.

A. I filled in the one portion of it.

Q. Well, the portion that you have just indicated, pertaining to the cause of death, did you fill that in?

[fol. 882] A. Yes, sir.

Q. And that cause of death that you set down, Doctor, was because of your examination of the body?

A. Yes, sir.

Q. And the history of the case?

A. Yes, sir.

Q. And that was your best judgment at the time?

A. That was my judgment at the time.

Q. Now, when was the death certificate made out with reference to your first visit to the house?

A. Well, I would say in a day or two. The custom in Colorado Springs in cases of this sort, of cases of death of any person, is for the undertaker to secure the information, such as the name of the individual, their age, their father's and mother's name and place of birth, and fill that in, and then it is brought to the physician. Or in the case of a coroner's case, to the coroner, who places in the date of death, the cause of death and that portion on the certificate. So that must be done prior to the burial of the body or the removal of the body from the county. Here it was done sometime after October 14th and prior to the shipment of the body from Manitou Springs.

Q. It was done so that the body could be shipped?

A. Yes, sir.

Q. There was no inquest held in this matter, was there?

A. No, sir.

[fol 883] Q. After your examination, Doctor, as to the physical facts, and your examination of the body, and the

history which you obtained of the death of this person, you were satisfied that the cause of death, as set down by you in the certificate, was true and correct, in the best of your opinion?

A. I was satisfied to the point of being willing to fill out this certificate and pass it at that time without an inquest.

Q. And you did so?

A. Yes, sir.

Q. And where there is any serious question in your mind as an officer of that county, coroner of the county, as to the exact or actual cause of death, you usually call an inquest, do you not?

A. I would have an inquest, yes.

Mr. Parsons: That is all.

Redirect examination.

By Mr. Barnes:

Q. Now, when you put down the history upon which you rely, when you filled in that certificate, did you know anything about that history, the details of the accident on Pikes Peak as told by Mr. J. D. Rogers on the witness stand?

Mr. Parsons: Now, just a minute; that is objected to as incompetent, irrelevant and immaterial.

Mr. Barnes: I withdraw that question and reframe it.

[fol. 884] Q. At the time you made out this death certificate and relied on the history concerning which you have been asked on cross-examination, did you have any knowledge whatsoever that with respect to the accident on September 21st, 1932, the defendant had claimed that the deceased, the then deceased, known as Winona James, deceased, his wife had been running an automobile down Pikes Peak, and that when people went to view her, they found her body on the righthand side of the car, and that there was human blood on the cushion of the coupe, behind the seat and on the seat on the righthand side of the car and a bloody hammer on the floor board upon that——

Mr. Clark: Just a moment now.

By Mr. Barnes:

Q. —under the seat, where a person would be sitting in the car.

Mr. Parsons: To which we object as incompetent, irrelevant and immaterial and not proper redirect examination. The question is the history of the cause of death, but as to the physical facts pertaining to the injury of the person and not how the accident occurred——

The Court: The difficulty is, that if you turn the witness over for cross-examination, the Doctor's statement was that the examination was made——

Mr. Parsons: The injury to the patient.

The Court: That is not what he said.

Mr. Parsons: I will ask to correct it now.

[fol. 885] The Court: I do not think you can alter your situation. If on cross-examination you open the door to redirect examination, you cannot sustain an objection by asking to re-examine a witness or to withdraw the question asked on cross-examination.

Mr. Parsons: That may be true, but certain improper judgment or inference cannot be drawn from a question, the only history to which the examination should have been directed, but my own intention would have been to elicit the factors that contributed to the death of this woman. How the accident happened certainly could not enter into it.

The Court: You still overlook the questions that you asked, Mr. Parsons. You asked the doctor whether his certificate was not based on his examination and the history of the case. There is nothing to indicate where he received his information or what it was. You left it right there. It didn't indicate what the history was.

Mr. Parsons: The only history that I think that the doctor could take into consideration in determining the cause of death, that is a matter that is obtainable from yourself. The only history he could refer to is the type of injury.

The Court: Mr. Parsons, departing from this case, merely for the purpose of discussion. If a body were found in the ocean, floating there, by the coroner, and the apparent death was by drowning and the doctor received certain other information and he came to the conclusion that death was due [fol. 886] to drowning with an inducing cause, say, of an epileptoid, and there turns out in addition to that, facts tending to produce death, then we have a similar circumstance, if the doctor said he based his history of the case on the evidence.

The objection is overruled.

By Mr. Parsons:

Q. Had you received that history which was embodied in the question I asked you?

A. I had not.

Mr. Barnes: That is all.

Recross-examination.

By Mr. Parsons:

Q. Before signing this death certificate, had you consulted the attending physician?

A. I had.

Q. And you had learned that she had been in the hospital, attended by Doctor Hanford?

A. Doctor Hanford told me about this——

Q. What do you mean?

A. That is the thing that is referred to there, about the history of being treated by Doctor Hanford.

Q. That didn't include the——

A. No.

Mr. Parsons: I just wanted one question about the doctor. [fol. 886-a] The Court: I think there is some misunderstanding. As I understand it, Doctor, your death certificate was based on what Dr. Hanford told you, and based on your actual observation?

A. I based my opinion on what Dr. Hanford told me about her after being placed in the hospital for care.

Q. In other words, you had the medical history of the case?

A. Yes, I had that first, and then what Mr. James told me at Manitou, and some other investigation which I made that evening, and that was all I believed at that time.

The Court: That will be all.

Mr. Parsons: Just a minute, Doctor—May I open my cross-examination for brief questioning, your Honor?

The Court: Certainly.

By Mr. Parsons:

Q. At the town of Manitou, Doctor, it is about 10,000 altitude, is it not?

A. No, sir.

Q. What is the altitude?

A. The Springs is 6,000, and the town 400 feet higher.

[fol. 887] Q. And in an altitude between six and seven thousand feet, it is not uncommon for persons coming from the coast to that region, especially if they have suffered some injury about the head, to suffer fainting spells, is it?

A. Well, I can't say that I have ever seen anybody in Manitou that had fainted.

Q. Well, it isn't uncommon for persons coming from the coast or that region, making a trip within the period of a few days from sea level to that altitude to suffer spells of dizziness, is it?

A. I think it would be very unusual to be dizzy at an altitude of 6000 feet.

Q. You think it would be?

A. Yes, sir. Of course, in going higher, such as the top of Pikes Peak, or some place of that sort, that is an entirely different proposition, my observation has been that the change of altitude from sea level to Colorado Springs or Colorado Springs to sea level, approximately 6000 feet, doesn't affect the average individual.

Q. Well, Doctor, with reference to this particular case, you made a careful examination of the head, did you not?

A. I examined the head, yes.

Q. And there was some blood in the inner part of the ears, was there not, or traces of blood?

A. That I saw?

[fol. 888] Q. Yes.

A. I can't say that I saw any blood. There was evidence of injury around the side of the head, these wounds which were healed. The dressings had been removed, but I don't recollect any blood.

Q. There was evidence of rather severe injury about the upper portion of the head, was there not?

A. Yes, sir.

Q. From the forehead clear around to the rear, to the base of the skull, was there not?

A. Yes, sir.

Q. And did you ascertain whether or not there was any indication of fracture?

A. Doctor Hanford, as I said before, on the way to Manitou that evening had given me this medical history.

Q. And was the history there that the x-rays disclosed actual fractures of the cranial bone?

A. Yes, sir.

Q. And there was then in your history that you received from the attending physician, a history of actual fractures of the skull?

A. Yes, sir.

Mr. Parsons: That is all.

Mr. Barnes: I think that is all, Doctor.

Mr. Parsons: Now, if your Honor please, as you can readily understand, these matters have approached us in a [fol. 889] manner for which we were somewhat unprepared, and we don't like to excuse these witnesses immediately. I don't know what their plans are. I realize they are from a sister state.

The Court: Well, none of the Colorado witnesses have as yet been excused.

Mr. Parsons: We would like to have them remain in attendance. We will not unduly keep them here.

The Court: All right.

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[fol. 890] Mr. Barnes: We offer in evidence at this time Exhibit 49 containing a photograph of Mr. and Mrs. James, Winona James.

The Court: It will be marked in evidence as Exhibit 49.

Mr. Barn-s: We offer in evidence People's offers 52 to 56 inclusive, the photographs of the house in Manitou.

The Court: These photographs will be received in evidence for the purpose of illustration.

Mr. Barnes: May we take this opportunity of showing them to the jury, your Honor?

The Court: Yes.

(Exhibits handed to the jury.)

Alva E. Custer, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Alva E. Custer.

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[fol. 891] Direct examination.

By Mr. Barnes:

Q. Mr. Custer, where do you live?
A. Colorado, Springs, Colorado.
Q. How long have you lived there, sir?
A. I was born there.
Q. You were there in the year 1932?
A. Yes, sir.
Q. Were you there in September and October, 1932?
A. Yes, sir.
Q. Do you recognize the defendant?
A. Yes, sir.
Q. Did you see him in Colorado Springs in September, 1932?

Mr. Clark: Just a moment, that is objected to on the ground that it is incompetent, irrelevant and immaterial.
The Court: Objection overruled.

A. Yes, sir.

Mr. Clark: If your Honor please, we would make that objection to any question that might be asked of this witness concerning anything that was said or done at Colorado Springs, or in 1932. It will not be necessary, I take it, to interpose the objection to each separate question.
[fol. 892] The Court: No. Let the record show that the Court understands that the objection is taken to each question asked this witness, and that unless otherwise indicated, let the record show that in each instance, as to each objection to each question, the objection is overruled. You may proceed.

A. Yes, sir.

By Mr. Barnes:

Q. Do you remember hearing of the incident of an automobile accident on Pike's Peak, in which Mr. and Mrs. James were involved?
A. Yes, he told me of it, himself.
Q. That is Mr. James did?
A. Yes, sir.
Q. Where did that conversation take place?
A. In the lobby of my hotel.

Q. Was Mr. James stopping at the hotel?

A. Yes, sir.

Q. What did he first tell you about it?

A. He told me that they were driving down from the Peak, his wife driving, and she ran off the road. I asked him how he was fortunate enough to not have been hurt himself? He told me he was sitting with the car door open, one foot on the running board, using binoculars, looking out across the mountains at the scenery, and of course when he saw that there was nothing could be done to avert the accident, that he jumped; that Mrs James attempted to jump, and her feet became entangled in the clutch and brake pedals of the car. She attempted to jump out of the same door that was [fol. 893] already open, the right-hand door, and in so doing, her head being out of the car, and her feet in the car, that the rocks passing by bruised her head, and that he didn't know whether or not she was going to live; that it was very serious.

Q. Did you have a conversation with the defendant at any later time?

A. Yes, sir.

Q. When was the next one that you had, in order?

A. During the period of Mr. James' stay at the hotel we had frequent conversations regarding her condition, and the accident.

Q. When is the next conversation that you recall that you had with him about the subject?

A. I don't recall exactly the time of our next one. He spoke later of his not knowing at the time what to do, at the time of the accident I speak of, whether or not to wait for help to come, that a car might pass by, or to leave her there, and that he was rather afraid to do either one, due to the fact that he had lost his gun, and was afraid of mountain lions.

Q. Did you have any conversation with him about how his wife, Winona, was getting along in the hospital at any time?

A. Yes, I asked as to her health, as I would any case similarly situated, where one of the family were injured, or ill, regularly, every day, I believe.

[fol. 894] Q. From time to time you learned from him the condition of her health, how she was getting along, did you?

A. Yes.

Q. Calling your attention now to a period of time just prior to the time that you heard of the death of Mrs. James in Manitou, after she had been discharged from the hospital, did you see the defendant at some time just prior to that?

A. Prior to her death, or during his stay in the house, which do you mean?

Q. Just prior to her death?

A. Yes, I believe the day of her death I saw him.

Q. What time of day?

A. In the afternoon, if I remember correctly.

Q. Did you have a conversation with him?

A. Yes, we talked. I asked him again as to her condition, and he told me that he regretted leaving her there, that he had come to town regarding hearing from his insurance, and didn't know but what the insurance company had left word at the hotel for him.

Q. Did he say what business he had with the insurance company?

A. That he was applying for a loan. In a former conversation he told me that it was necessary, that they were more or less destitute of funds, due to the accident.

Q. So on this afternoon of the day that Mrs. James died, he mentioned the insurance company, and what else did he say? Did he say anything about leaving her alone?

[fol. 895] Mr. Parson: He just told about that.

A. Yes, I just said that he hesitated about leaving her alone.

By Mr. Barnes:

Q. Did he say why?

A. Yes—well, he had told me why previous to then.

Q. What had he said about that before that?

A. I believe it was the day that Mr. James checked out of the hotel that in a conversation with him he had told me that he was going to take her back to Manitou, that there was no further use of his going into debt, that she was all right, that he could take care of her. He had nothing to do, and was visiting there, and that he was going to take her home, and he had told me that the doctor had cautioned both him and Mrs. James about her stooping over, because of it causing dizziness, and also against the washing of her hair, which might cause infection to the head wound.

Q. And that was about the time he left your hotel?

A. Yes.

Q. And that would be about a week, approximately, roughly, a day or two one way or the other, of the time you heard of her death, prior to the time you heard of her death?

A. Yes. My bellhop, I believe, took him to the hospital and picked up Mrs. James, and took them to Manitou.

Mr. Barnes: Cross examine.

[fol. 896] Cross-examination.

By Mr. Clark:

Q. You will pardon me, sir; I didn't quite get your name?

A. Custer.

Q. You are the proprietor of a hotel at Colorado Springs?

A. I am the manager of this hotel, yes.

Q. And were you such manager during the year 1932?

A. Yes, sir.

Q. You met Mr. James as a guest at that hotel?

A. Yes, sir.

Q. He was registered there, him and his wife, at the time that the wife received the injuries that have been the subject of testimony here?

A. I don't believe his wife was registered there. He was registered there.

Q. And you saw him and had some talk with him the day after the date of the injuries received by his wife?

A. I wouldn't say whether it was the next day, or the second day after.

Q. At any rate, it wasn't the same day, you are sure of that?

A. Yes, sir.

Q. And the conversations that you had were mere casual conversations, all of them, were they not?

A. More or less so, I would say.

Q. That is, they were not for any business purpose?

[fol. 897] A. No.

Q. Nor for the purpose of fixing his statements in regard to any matters that were, or might be the subject of any litigation, either civil or criminal?

A. No, it was an unusual accident, and therefore was

more or less indelible on my mind. There had been no fatalities on the Peak road up to this time, and it still stands, except in a racing car.

Q. So, by reason of the seriousness of the injuries, you felt a natural friendly interest?

A. That was all.

Q. You didn't burden your mind particularly with the details of any of these conversations, did you?

A. Well, there were some questions that arose. As I understand it, I am not allowed to testify as to heresay.

Q. No, but you did, without going into the substance of anything that you heard, you did hear something which caused you to pay more attention to the circumstances of this matter then you otherwise would have done, is that about it?

A. Yes, sir.

Q. In the course of the conversations don't you remember that Mr. James said that he lost his money, that he had money in a pocketbook on that occasion?

A. I don't recall.

Q. Don't you recall that he said that all the money that he had was lost out of his pocket at the time of the accident?

[fol. 898] A. It seems to me there was something said regarding money, but I am not positive.

Q. Didn't he give that to you as the reason why it was necessary for him to negotiate a loan upon the insurance policy?

A. Yes. During his time there, when Mrs. James' father came, he obtained, I believe, $100.00 from her father before he left.

Q. And in the course of the conversation; he said, did he not, that by reason of the loss of money, and the additional expense caused by the accident, he thought it was better to move her out of the hospital, and cut down the expenses?

A. Yes, he said that he was as capable of taking care of her, due to her condition at that time, as they were in the hospital.

Q. In fact, he told you, didn't he, that he didn't have the money to keep her in the hospital.

A. That is right.

Q. And was obliged, therefore, to remove her?

A. That is right.

Q. And you have no knowledge that his statement in that respect is not true, have you?

A. No.

Q. Now, at the time of this last conversation that occurred,—did you say on the 31st of September?

[fol. 899] A. The last conversation?

Q. Oh, I beg your pardon. When did you say that last conversation occurred?

A. It was on the same day that Mrs. James was found dead.

Q. You have those two events fixed in your mind as occurring upon the same date?

A. Yes, due to the fact that he had been a guest in the hotel, naturally it would be fixed in my mind when this occurred.

Q. Now, you didn't hear of the death of Mrs. James until a late hour that day, did you?

A. I don't believe I heard until the next morning.

Q. On the day of Mrs. James' death what time of day did you first see Mr. James?

A. I believe it was shortly after lunch time.

Mr. Clark: Will you please read me the last question and answer?

(Question and answer read by the reporter.)

Q. And that was at your hotel in Colorado Springs?

A. Yes.

Q. And Colorado Springs is about how far from Manitou?

A. Six miles.

Q. How long did you have Mr. James under your observation at that time?

A. I believe he was in the hotel at that time in the neighborhood of an hour, or so.

[fol. 900] Q. And according to your best recollection, about what time of day was it when he left the hotel?

A. Well, mid-afternoon.

Q. Three or four o'clock?

A. Yes, that would be what I would think, around 4:00 o'clock.

Q. About 4:00 o'clock?

A. Yes.

Q. Did you see how he left, whether on foot, or by vehicle?

A. No, I didn't.

Q. You did hear him say, in the course of these conversations, that his automobile had been almost totally destroyed in the accident, didn't you?

A. Yes, he had told me that he had sold it then and there, on the spot, on the Peak, for $25.00, so I assumed that it was a total wreck.

Q. And does Manitou lie uphill from Colorado Springs?

A. Yes.

Q. And so that if one were traveling on foot it would be at least an hour and a half from one place to the other?

A. Yes, if he was traveling on foot.

Mr. Clark: I think that is all.

[fol. 901] Redirect examination.

By Mr. Barnes:

Q. About how far is it from Manitou to Colorado Springs?

Mr. Clark: Six miles, he said.

A. Six miles.

By Mr. Barnes:

Q. You spoke of auto races, at least racing machines on Pike's Peak as the only instance you had known of in which there had been fatalities. Did they have auto races up Pike's Peak?

A. They did until——

Mr. Clark: Just a minute. That is objected to as irrelevant.

The Court: I don't think it is material.

Mr. Barnes: That is all, Mr. Custer.

The Court: We will take our afternoon recess at this time. The jury will heed the admonition heretofore given. We will take a short recess.

(Recess.)

The Court: Let the record show all parties present.

Mr. Barnes: Mrs. Snyder.

[fol. 962] Mrs. Irene F. Snyder, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.
A. Mrs. Irene F. Snyder.

Direct examination.

By Mr. Barnes:

Q. Where do you live, Mrs. Snyder?
A. Colorado Springs, Colorado.
Q. How long have you lived there?
A. 12 years.
Q. Were you living there in September and October, 1932?
A. I was.
Q. What is your business or occupation?
A. I am a bookkeeper at Bethel Hospital.
Q. That is in Colorado Springs?
A. Yes, sir.
Q. Do you know the defendant, Mr. Robert James?
A. Yes, sir.
Q. Did you see him in the month of September, 1932, in Colorado Springs?
A. I did.
Q. Were you acquainted with Mrs. Robert James, or did you see her during her lifetime?
A. No.

Mr. Parsons: What was the answer?

[fol. 963] A. No.

By Mr. Barnes:

Q. What are your duties at the Bethel Hospital?
A. Oh, I had charge of all accounts, and it was my duty to contact with all persons responsible for hospital bills.
Q. Does the hospital, in the regular course of its business, keep as a general part of its business, records of patients entering the hospital?

Mr. Parsons: May the same general objection be made?
The Court: Yes, the same general objection may be made, and the objection is overruled.

By Mr. Barnes:

Q. Does it keep records of the diseases with which the patients are inflicted?

A. Yes, sir.

Q. Does it contain doctors and nurses?

A. Yes, sir.

Q. Is the Bethel Hospital a corporation?

A. Yes, sir.

Q. Are you familiar in the manner in which those records are kept?

A. I am.

Q. The business of the Bethel General Hospital is — that it is necessary or proper to keep those records?

A. Yes, sir.

Q. Could you produce here the record of the hospital with respect to a patient by the name of Nona P. James? [fol. 904] A. Yes.

Q. Could you produce here the records of the hospital with respect to Robert S. James, the defendant?

A. Yes, sir.

Q. Are the records which you have brought here the records of the original entries of those transactions?

A. Yes.

Q. And are those entries made at the time of the transactions, or within a reasonable proximity to the time that the transactions are made?

A. They are made during the patient's stay in the hospital by the doctors and nurses.

Q. Are they made by persons having personal knowledge of the transactions shown thereon?

A. Yes, sir.

Q. I will call your attention to a series of records clipped together with a metal clip, bearing classification "210 N-194 B". What do those numbers represent?

A. They indicate the kind of case, medical or surgical.

Q. And are all the records, with respect to each patient, kept together in one place?

A. Yes, sir.

Q. And are these documents I am now showing you the original records of that hospital, and do they indicate what I asked you in the other questions?

A. Yes.

[fol. 905] Q. And who is this a record of?

A. Nona P. James.

Q. By looking at the records, can you tell us when Nona P. James was admitted to the hospital?

A. September 21st, 1932.

Q. You may hold them in your hand. And when was she discharged?

A. October 8th, 1932.

Q. Do the records disclose what, if any, treatment she received?

A. Yes.

Q. What treatments did she receive?

Mr. Parsons: If your Honor please, we object on the ground that it is hearsay. I believe that objection should be made in addition to the objections already interposed to this line of testimony. However, I might state that counsel very kindly handed me these records, and if I might have time to examine them, I can stipulate, and may have no objection to their going in.

Mr. Barnes: Well, I have handed counsel another file, and it might be desirable for him to look at both of them.

Mr. Parsons: May I make some inquiry?

Mr. Barnes: Yes.

By Mr. Parsons:

Q. This record that I hold in my hand, Mrs. Snyder, does this record contain all of the written memoranda, and all of the records contained in your hospital filed pertaining [fol. 906] to the particular case?

A. All with the exception of the x-ray pictures.

Q. All with the exception of the x-ray pictures?

A. Yes, sir.

Q. And did you bring the X-ray pictures of the patient here?

A. Yes, sir.

Mr. Barnes: Yes, she has them here, (handing to counsel).

Mr. Parsons: If your Honor please, we have no objection to either one, or both of the hospital records going in, of course, subject to our general objection. In other words——

The Court: There is no special objection?

Mr. Parsons: There is no special objection. We don't

want to be placed in the position that we waive any of our objections to the testimony given by the witnesses from Colorado.

Mr. Barnes: Then we offer the two records in evidence, one being the record of the hospital with respect to Winona P. James, and the other with respect to the defendant. May we have it likewise understood—I did speak to Mr. Clark about this; I don't know whether I did to you, Mr. Parsons, or not, about taking photostatic copies of those, and withdrawing the originals, and replacing them with photostatic copies?

Mr. Parsons: We will stipulate that you may introduce these records in evidence, and that photostatic copies may be made thereof, and that the photostatic copies may be [fol. 907] filed in lieu thereof, and that these records may be withdrawn and returned to their rightful owner.

Mr. Barnes: Thank you, Mr. Parsons.

The Court: The hospital record of Winona P. James will be marked Exhibit 58 in evidence, and the hospital record of Robert James will be marked Exhibit 59, and let the record show that by this proceeding Mr. Parsons does not in any way waive any of the general objection, but that Mr. Parsons merely consents to the introduction, under the Court's overruling of that objection.

Mr. Parsons: There are some X-rays which we will stipulate may go in under the same circumstances. In other words, we have our same general objection, but to save time, any of these that the witness says are X-rays from her file may go in.

The Court: Pertaining to the case.

Mr. Parsons: Pertaining to the case of Winona P. James.

Mr. Barnes: Yes. I will ask the witness one or two questions; there are two groups of them, and I think it would be better if they were marked separately.

The Court: Will you indicate the number in each group, then?

Mr. Barnes: The number of X-ray pictures in one group is three, as contained in an envelope bearing No. 8609, which we offer as one exhibit, and in the other group, in an envelope bearing No. 8638 there are five X-ray pictures. [fol. 908] The Court: Those will be respectively marked Exhibit 60 and 61.

By Mr. Barnes:

Q. Mrs. Snyder, calling your attention to the envelope, and the X-ray pictures therein contained, which envelope bears the number "8609", and the name "Mrs. James' Skull",—is that "steno"?

A. Stereo.

Q. "Stereo 9-21-32." State whether or not those are the X-ray pictures from the Bethel General Hospital, showing the condition of the head of Mrs. Winona, or Nona P. James?

A. They are.

Q. And these were taken on the date that the envelope bears, 9-21-32?

A. Yes.

Q. Calling your attention now to the other envelope containing five X-ray pictures, which envelope bears a number 8638, and which envelope contains the name "Mrs. Winona James, 10-3-32; head re-examination", state whether or not those X-ray pictures are part of the records of the Bethel General Hospital, and show the pictures taken of the head of Mrs. Winona P. James on the 3rd of October, 1932?

A. Yes.

Mr. Barnes: Then we offer them in evidence, under the stipulation reserving the objections that counsel has indicated to the last group of exhibits.

Mr. Parsons: That is true.

[fol. 909] The Court: Respectively 60 and 61.

Mr. Barnes: 60 being envelope 8609.

Mr. Parsons: What is 61, Mr. Barnes?

Mr. Barnes: 61 is the envelope bearing No. 8638.

Q. Did you have any discussion with Mr. James at any time with respect to the payment of the hospital bill for Mrs. James?

Mr. Parsons: Now just a minute. That is incompetent, irrelevant and immaterial. That certainly can have no bearing upon this matter.

The Court: The subject matter of the conversation might be of little or no materiality, but there might be in that conversation a matter incidental thereto, which might be material. I can't rule on that, whether it is, or is not. Objection overruled.

Mr. Parsons: It is understood, of course, our same general objection applies?

The Court: The same general objection will be understood to apply to all these questions.

Mr. Barnes: I don't want to lead, your Honor, but possibly I can drive at a particular thing, and avoid anything that might be objectionable. I will try it, and unless counsel objects, we will go ahead.

Q. Did you have any discussion with Mr. James at any time about his ability to pay that hospital bill?

A. Yes.

[fol. 910] Mr. Parsons: Now, just a minute. That is incompetent, irrelevant and immaterial.

The Court: That will be overruled.

By Mr. Barnes:

Q. State that conversation.

A. It was either the day after the accident, or the day that Mr. James came to the office, and, of course, I asked him how he would be able to take care of the hospital expense, and he said he had no means of taking care of it at the time, but he was going to negotiate a loan on an insurance policy; that he hoped to be able to pay for it as she left. Mr. James was wearing a lady's diamond ring on the little finger of his right hand, and I tried to get him to give it to me as collateral, but he refused to leave it, stating that that was Mrs. James' engagement ring, and it would break Mrs. James' heart if she could not have it when she was ready to have it, so by the time Mrs. James was ready to leave he hadn't received his loan, so the bill was not paid.

Mr. Barnes: Cross-examine.

Mr. Parsons: May I have that last answer read?

(Answer read by the reporter.)

Cross-examination.

By Mr. Parsons:

Q. It was not paid at the time of her leaving, is that right?

[fol. 911] A. Yes.

Q. Now, do you recall at a time, Mrs. Snyder, during the

stay of Mrs. James in the hospital, that one of the special nurses was laid off, and Mr. James spent considerable time there watching her, or are you familiar with those matters?

A. I would have no way of knowing.

Q. I understood you were just in the office, is that right?

A. Yes.

Q. So you would not have any knowledge of what was going on in the room?

A. I would have knowledge of when the nurse was dismissed.

Q. But you would not know, yourself?

A. No.

Mr. Parsons: That is all.

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G. B. Dunnington, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. G. B. Dunnington.

[fol. 912] Direct examination.

By Mr. Barnes:

Q. Speak out loud, please, Mr. Dunnington. What is your business?

A. Barber.

Q. Where is your place of business?

A. 857 South Grand.

Q. Do you know the defendant, Mr. James, here?

A. Yes, sir.

Q. Did you know him in the year 1932?

A. Yes, sir.

Q. Do you remember a case of Mr. James going on a trip to Colorado?

A. Yes, sir.

Q. Prior to that time did you have any negotiations with him with reference to the purchase of a barber shop?

Mr. Parsons: Just a minute. That is objected to as immaterial and incompetent. I cannot, for the life of me, see how this would establish any point.

Mr. Barnes: The same purpose will appear in a moment, your Honor, that appeared with the last witness.

The Court: The objection is overruled.

A. Yes, sir, I did.

By Mr. Barnes:

Q. And had those negotiations been completed when he left?

A. No.

[fol. 913] Q. After he left for Colorado, did you receive a communication from him while he was in Colorado?

A. Yes, sir.

Q. And pursuant to that communication, did you send him any money?

A. Yes, sir.

Mr. Parsons: Just a minute. That is objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

By Mr. Barnes:

Q. Do you have that communication now?

A. No.

Q. Is it destroyed, or lost?

A. No, I wired the money.

Q. I mean the communication you got?

A. No, I have not.

Q. Is it destroyed, or lost?

A. I didn't destroy it.

Q. Do you know where it is?

A. No.

Q. Well, what was in the communication?

A. Well, he said he needed some money, and that if I would send him some we would go ahead with our deal, and it could be worked out, on the payment on the place.

Q. Was there anything in the communication with reference to the word "accident"?

A. Yes. He told the story about his wife's accident, [fol. 914] and that was why he needed the money.

Q. That was in the communication?

A. Yes, sir.

Q. And pursuant to that did you send any money to Colorado to him?

A. Yes, sir.

Q. How much?

A. I don't know whether it was $100.00 or $200.00.

Q. Thereafter, did you see him in Los Angeles?

A. Yes.

Q. Did you have a conversation with him in Los Angeles, after he returned, about the death of his wife in Colorado?

A. Yes, I did.

Q. How many conversations did you have with him about that?

[fol. 915] A. Well, I couldn't tell you the exact number about that.

Q. Well, referring now to an incident of seeing a death certificate, did you have any before you saw that?

A. Yes, sir.

Mr. Parsons: May it be understood——

The Court: As to any testimony connected with the Colorado affair, the same objection and ruling will ride as to the Colorado death.

Mr. Silverman: We will so stipulate.

By Mr. Barnes:

Q. You are a resident of Los Angeles now?

A. Yes, sir.

The Court: You live out on Grand Avenue?

A. Yes, sir, that is my business address.

Mr. Barnes: You have lived there how long, approximately?

A. 10 or 12 years.

Q. Referring to that incident I just mentioned about seeing the death certificate, did you have a conversation sometime before you saw that?

A. Yes.

Q. About the accident?

A. Yes, sir.

Q. State that conversation.

A. Well, he said that he had an accident up on Pikes Peak—they were going on this trip, you know, and he said that he drove up and she drove down, and that coming down he was watching the sun setting through a pair of field [fol. 916] glasses, and he had his foot on the running board,

and I don't remember all the conversation, but this is the summary of it.

Q. Substance of it?

A. Yes, sir.

Q. Go ahead.

A. And he said that the first thing he knew they were over going up the road, so he said he jumped and the car run the rest of the way down. He said he rolled down 200 feet and she rolled down about 500 feet, as I remember. He said he went on the rest of the way down and tried—he didn't know whether she was going to live or die, and he was kind of scared to leave her on account of the wildness of the country up there, and he tried to make her as comfortable as possible and finally went to get help. He figured he hiked about five or six miles to get help for her.

Q. Continue.

A. And he sent for the ambulance. He got help and he went for an ambulance. I think he said they went to the company or the station where, you know, the man in charge was. I don't recall just exactly who it was that he got to help him.

Q. Yes.

A. And he waited for the ambulance and had to wait a long while for the ambulance. He said he had to wait a long while and then they went from there to the hospital, with the lady, Mrs. James.

[fol. 917] Q. Was there any conversation about what occurred after she got out to the hospital?

A. Well, he wanted to save time and he wanted to take care of her, since she had got to that stage where she didn't need so much attention and he thought that he would get somebody to be with her to take care of her and he said he did. Then, he said——

Q. I cannot hear you, sir.

A. He said he went down town one day to the grocery store to attend to some business and he came back and brought those groceries back and brought somebody to carry the groceries. He had so many that he couldn't carry them; and he said he found his wife lying on the floor in the bathroom dead. He said that he supposed she died of brain hemorrhage.

Q. Now, after that incident, did you see a document entitled "Death Certificate" anywhere?

A. Yes, that was several weeks or so later, a couple of weeks later.

Q. And did you look at it?

A. Yes. I had not purchased the shop yet. I was running it for him. He was in and out and naturally, the owner of the place, and how I happened to see it was that he dropped it out of his pocket after pulling a bunch of papers, and I saw it laying on the floor.

Q. It had a name on it?

[fol. 918] A. Yes, sir.

Q. Now, then, after that information, did you return that to him?

A. Yes, sir.

Q. Then, did you have any conversation with him about Mrs. Winona James at the house?

A. Yes, sir, about the circumstances of her death, you mean?

Q. Yes.

A. Yes, I did.

Q. What did he say?

A. Well, I understood from what he told me that she died of an apparent hemorrhage. When I saw the death certificate it set forth that death was from drowning, so I asked him about the real circumstances and he said that she did die from drowning, that the apparent hemorrhage was attributory to what made her fall.

Q. Did he say where she drowned?

A. Well, he said he didn't know, but evidently she had gotten up to go to wash her head in the bathroom and she must have filled the tub up and fainted in the tub. That is the only excuse or reason that he could think of.

Q. Did you have a conversation with him at any time about the subject matters of shoes?

A. Well, he had on the same shoes when he came back that he left in, and he was sitting in the barber chair getting [fol. 919] a shine and I asked him how he failed to get his shoes and his clothes scratched up, and he said, "Well, that's funny, isn't it?" and that was all that was said. We changed the subject.

Cross-examination.

By Mr. Parsons:

Q. Well, you knew that he walked some five or six miles with those shoes, didn't you, down the mountain side? And

you gathered that, did you not, from the conversation with him?

A. That is what he said.

Q. You have sat here in court listening to testimony, have you not, of these witnesses from Colorado?

A. About one hour, yes.

Mr. Barnes: What was that answer?

Mr. Parsons: "About one hour."

Q. Now, this death certificate that he had there in his pocket that you looked at, what did it say in the clause pertaining to the cause of death? What is your best recollection now as to what was therein contained?

A. It was accidental death by drowning.

Q. Accidental death by drowning. Is that what you recall was there?

A. Yes.

Q. And there was nothing else?

[fol. 920] A. Well, there was the name.

Q. Pardon me. I didn't make myself plain. On the question of the cause of death. You have now stated the cause of death was accidental death by drowning, is that it?

A. Yes.

Q. Now, on that subject was there anything else contained in the death certificate, I mean on the subject of the cause of death?

A. I don't recall now.

Q. Do you recall anything in there with reference to contributing factors?

A. No.

Q. You don't recall that being in there?

A. No.

Q. Now, you don't like Mr. James, do you?

A. I don't see why I should dislike him.

Q. Well now, really, you do have some little feeling towards him, don't you?

A. No.

Q. None at all?

A. No.

Q. And you are a competitor of his, are you not?

A. No, sir.

Q. Well, perhaps that wasn't choice language. You operate a barber shop in close proximity to the shop that was operated by Mr. James, do you not?

[fol. 921] A. I do.

Q. How many doors distant?

A. A block and a half.

Q. About a block and a half, is it not?

A. Yes.

Q. Have you ever told any persons in the last year or two that you didn't like Mr. James?

A. Well, I told him.

Q. You told him you didn't like him?

A. Yes.

Q. You and he had some words, didn't you?

A. No.

Q. Well, you told him you didn't like him, didn't you?

A. I didn't like his business ethics, I told him.

Q. You didn't like his way of doing business, is that right?

A. Yes, sir.

Q. And you have told other persons that you didn't like him, haven't you?

A. No, I didn't like his business ethics.

Q. Have you told any person at all, regardless of who it was, other than Mr. James, that you didn't like Mr. James or that in substance?

A. I might have.

Q. You might have?

A. Yes.

[fols. 922-926] Q. The thought at least was in your mind anyway, wasn't it?

A. Yes, sir.

* * * * * * *

[fol. 927] C. A. Pries, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: C. A. Pries.

* * * * * * *

Mr. Parsons: I think I stated to counsel during the early part of the trial, that I would raise no objection as to these documents being photostats, Your Honor. There might have been some difficulty procuring the originals, so we will stipulate that the photostats may be used in lieu of the original. However, to these documents that counsel has

in his hand and is about to show the witness, we would make the same general objection as was heretofore made.

The Court: I don't know the nature of the testimony. You had better state the objection.

Mr. Parsons: This is a further part of the Colorado incident.

Mr. Barnes: This has to do with the insurance policies.

Mr. Parsons: It arises out of the same transaction and I think the same general objection that has been made would cover it.

[fol. 928] The Court: So far as it relates to the contention of the defendant that anything relating to the Colorado accident is admissible, those objections will ride, the general objections. If there are any specific objections of course, you will announce them.

Mr. Parsons: Yes.

Mr. Barnes:

Q. Mr. Pries, you know Mr. James?

A. I do.

Q. And you knew him in the year 1932?

A. I did.

Q. Were you ever connected with the Prudential Life Insurance Company?

A. Yes, sir.

Q. And were you accustomed to going to Mr. James' barber shop that year?

A. Yes, sir, I was in there frequently, every week.

Q. When you were in there on any occasion, did you ask him if he had any prospects for insurance that he could refer you to so that you could sell them some insurance?

A. That is a natural question I ask everyone.

Q. You asked him among others, did you?

A. I did.

Q. This barber shop was in your territory while you were with the Prudential Life Insurance Company?

A. It was the center of the territory.

Q. On any of these occasions and particularly prior to the [fol. 929] 20th of May, 1932, did you have such a conversation with him?

A. Yes sir, quite frequently.

Q. I show you here a photostat of an insurance policy of the Prudential Insurance Company, and calling your attention to the application that is made a part of it, that is

shown on the inside, have you seen that application on that policy before?

A. Yes sir, I wrote it.

Q. Perhaps the dates appearing in that application will help you refresh your memory as to some of these incidents. If they do, I see no objection to your using them. Prior to the date shown on this application of the 20th of May, 1932, did the defendant tell you that he might have a prospect?

A. Yes, he did.

Q. Approximately how long before the 20th of May, 1932?

A. Possibly three or four weeks or thereabouts.

Q. Had you had any business transactions with Mr. James personally, before the 20th of May, 1932 about insurance?

A. Yes, I had written the two contracts on them each and also one on his mother.

Q. And with respect to those that he took on his own life did you have any conversation with him about what kind of insurance he wanted?

Mr. Parsons: That is immaterial, irrelevant and incompetent.

[fols. 930-931] The Court: Overruled.

A. He preferred endowment at that time.

Q. Is that what he said?

A. He so stipulated.

Q. That is what he told you?

A. Yes, sir.

. . . . . .

[fol. 932] Mr. Williams: There is one other matter, your Honor. Three of the witnesses from Colorado, namely, Jim Rogers, Gerald Rogers, and Mrs. Snyder, feel that it is necessary, for their employer's interests, that they return to Colorado as soon as possible, and they would like to leave by train tonight. Counsel have indicated a desire possibly [fol. 933] to further examine these witnesses. May I suggest that if such an examination is to be made, that it be made today, so that these witnesses may not be held over the week end in Los Angeles? I may say that while the keeping of them entails some expense, I am not putting it on that ground at all, for the reason that I don't think that in a matter of this importance that a small amount of expense one way or the other should cut any figure. I am merely

putting it on the ground that these witnesses are very desirous of getting out tonight if they can, and not losing the two working days that they would lose if they had to stay here over the holiday, and be on the railroad during the working days.

As to the other witnesses, they are willing to stay here until Monday night. Of course, I understand if your Honor so orders, the witnesses will remain here, but I suggest that a method can be worked out so that everybody can be assisted to some extend in the manner I suggest.

Mr. Clark: If your Honor please, I think the Court and counsel know me well enough to know that I have always regarded it as an ethical duty of a lawyer to avoid any unnecessary waste of the time of any witness. We are able to exercise influence over the attendance of witnesses by reason of the fact that we are officers of the Court, and irrespective of any personal feeling we may have, the burden devolves upon us to concern ourselves actively to save the time of any witness, even though he may be an adverse wit- [fol. 934] ness, and even though he may be a witness as to whom we may have a personal dislike. I have no certain knowledge that any of these witnesses will be used by the defense, and I have no certain knowledge that they will not, but I do know this, that it would be impossible for us to use them as counsel suggests. They are here now. This phase of the matter has been suddenly thrust upon our attention. It has come to our attention during the midst of the trial when we have many things with which we are deeply concerned, which involved much work, one of which was the question as to the admissibility of any testimony concerning the matters to which their testimony relates.

As far as I, individually, am concerned, I am perfectly prepared to take my place now. Either I am right or wrong. But so far as I am concerned, my own personal inclination would be to leave this subject right w-ere we find it, not to offer any kind of proof concerning it, and let the witnesses go upon their way as soon as they choose. I say that would be my present feeling as far as I am concerned. I am responsible for the course of the trial, and I have had no opportunity to confer with my associates on this subject, except for a hurried consultation when the subject was suggested. I understand that their minds are in such a condition that they may wish to offer some facts which can only be offered by these witnesses. I also understand that the

[fol. 935] Court can receive such testimony only after the prosecution's case has been closed. I have heretofore stated the objection, as well as I know how, to the Court.

The Court: Well, the situation may change, gentlemen. You will have more opportunity during the noon recess to consider the matter. It may be that the problem may be solved. I don't think there is any difficulty, as far as the Court is concerned. However, I want to say this, that if the witnesses are not going to be needed, it would be better to let them go today. If there is any possibility of taking their testimony today, I think that would be appreciated. I want to say very frankly, from what experience I have had in the past, that I realize that not only do counsel have their rights, but they are only doing their duty when they think that the evidence should be given in the regular order. You may proceed with the testimony.

C. A. Pries, resumes stand.

Direct examination (Continued).

By Mr. Barnes:

Q. To give you the continuity from yesterday, Mr. Pries, without taking the time to read the transcript to you, briefly we were talking about, as I recall, the subject matter of your being in the insurance business, and this barber shop was in your territory, and you also inquired for prospects, and that one of those inquiries was made of the defendant, [fol. 936] and he told you, possibly three or four weeks prior to the 20th of May, 1936, that he had a prospect for you. Do you recall that?

A. That is correct.

Q. At this time did he tell you that the prospect would be a man or a woman? Or did he mention it?

A. I can't say definitely.

Q. Did you talk with him about the prospect that he had for you, prior to the 20th of May?

A. Yes, just a day or two before, when he told me that that night two days hence would be the night that he would want me out.

Q. Did he say where you would go?

A. He said he would have the prospect at his home, and he also wanted some insurance himself.

Q. A couple of days later did you go to his home?

A. I did, in the evening, about 7:00 o'clock.
Q. Where was Mr. James living at that time?
A. An apartment house at 11th and Western Avenue.
Q. And he had an apartment there?
A. Yes, sir.
Q. Did you go to the apartment?
A. I did.
[fol. 937] Q. And when you went in did you see Mr. James?
A. He opened the door.
Q. Did you meet any other person there?
A. Yes, I met—at that time her name was Miss Wallace.
Q. Did the defendant introduce you to her?
A. He did.
Q. And what conversation took place there with respect to insurance?
A. He stated that he wanted $5,000.00 on his own life and the policy was written, and the terms discussed and after we were through he suggested that Miss Wallace take a like amount from the same address.
Q. I show you People's Exhibit 49, a picture where there are a number of people standing, two of which are encircled with pen and ink. May I borrow this light, just a moment, Mr. Person? Do you recognize the two people shown in that circle?
A. Yes, I do.
Q. Who is that?
A. Robert James and his wife, Winona.
Q. And is that the Miss Wallace that you met there on that occasion?
A. Yes, sir.
Q. And what was said, if anything, about insurance on Miss Wallace?
A. Merely that he wanted the same amount for her.
[fol. 938] Q. And did you take an application for Miss Wallace?
A. At the same time.
Q. I have here a photostat that I showed you yesterday. I don't believe this has been marked. May we have this marked?

The Court: The policy and application?
Mr. Barnes: Yes, your Honor.
The Court: 62 for identification. I was under the impres-

sion that there was some statement regarding that. Am I right?

Mr. Barnes: Yes, there was as far as it being a photostat was concerned, that there would be no objection on that ground.

Q. Is that a photostatic copy of the application that you took from Miss Wallace at that time as is shown attached to this photostatic copy of the policy Exhibit 62?

A. It is.

Mr. Parsons: Just a minute; we object on the ground that it is incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

A. It is.

By Mr. Barnes:

Q. Calling your attention to the name "Nona T. Wallace" was that written in your presence?

A. That was.

Q. And the date that is there, the 20th of May, is that the date that you took the application?

[fol. 939] A. That is the date.

Q. Thereafter did you turn the application in to the Prudential Life Insurance Company?

A. On the day following.

Q. And thereafter was the policy received by you and delivered to any person?

A. It went first to the doctor and issued and then delivered by myself.

Q. To whom did you deliver the policy?

A. I delivered hers to her and his to himself.

Q. Was there anything said about who should be the beneficiary in the policy on the life of Winona Wallace?

A. Mr. James stated—wanted to know or claimed that they were going to be married in a month or two and wanted to know if his name could be inserted as beneficiary at the issuance of the policy. I told him no, that there was no insurable interest, it could not be done.

Q. Was any statement made as to how he could become the beneficiary?

A. Yes, I mentioned that after they were married, provided she consented, that it could be changed.

Q. Thereafter did you hear of the death of the insured, Miss Wallace?

A. Yes.

Q. Did you have occasion to talk with the defendant about the death thereafter?

[fols. 940-950] A. At what time?

Q. At any time. I will pick out some particular time after while. Did you talk with the defendant at any time after her death?

A. Well, when he returned here I filled out the claim papers, got the necessary information and also I might add that I filled out the identity statement, viewing the body at the morgue or at the undertakers.

* * * * * * *

[fol. 951] Q. You do recall, however, that shortly after the death of Mrs. James that you did see a certified copy of the proof of death from Colorado?

A. The Coroner's report.

The Court: May I ask a question there?

Mr. Parsons: Surely.

The Court: Was the copy of the Cor*nore*r's report filed at Sioux Falls?

A. Yes, it was filed at Sioux Falls.

By Mr. Parsons:

Q. Do you know whether or not it followed the proof of death, or did it go forward subsequent to that?

[fol. 952] A. Well, this is the proof of death here.

Q. Which one? I think I have it.

The Court: Mr. Pries, as a matter of fact, there is a certain form that is used in all cases for proof of death?

A. Yes, sir.

Q. Quite frequently they require the Coroner's findings?

A. In this case it required a Coroner's statement, a certified statement.

By Mr. Parsons:

Q. All of which were obtained, and presented to the Prudential Insurance Company before the claim was paid?

A. That is right.

Q. And did you have occasion to claim—strike that.

Now, after you had learned of the death of Mrs. James, you assisted Mr. James in the proper preparation of the papers, did you not, that were necessary?

A. Yes, sir.

Q. And then it is the common practice for agents to aid those who have insurance, so that they might fill out the proper forms, and give them to the company?

Mr. Barnes: We so stipulate.

By Mr. Parsons:

Q. That is the common practice, is it not?

A. Yes, sir.

Q. In fact, when you learn of the death of a person, upon [fol. 953] whom you have written a policy, you follow them up, do you not, to establish its authority?

A. Agents of the organization do that.

Q. Yes. And that is a true copy, is it not?

A. Of those who are to do that.

Mr. Barnes: Keep your voice up, please.

By Mr. Parsons:

Q. When we get over here, we kind of get into a friendly chat, so keep your voice up. I show you a letter, which appears to be a portion of Exhibit 57, and appears to be a carbon copy of the letter. Will you examine that, please, sir? You have seen that document before, have you not?

A. It was right here in the court.

Q. Well, you had seen it prior to that time?

A. I assisted him in writing it.

Q. Yes. As a matter of fact, you dictated this document, did you not?

The Court: Is that the smaller or larger letter?

Mr. Parsons: I am referring to the larger portion of the letter, dated October 21, 1932, addressed to Dr. Hanford, 316 North Tejon, Colorado Springs, Colorado. You actually dictated this?

A. No, Mr. James and I went next door to a public stenographer and had the letter gotten up.

Q. Between the two of you you prepared the information and gave it to the stenographer, is that right?

[fol. 954] A. Yes, it was necessary to do so.

Q. Well, we won't quarrel about it; I don't want to be rude with you, but if you will just answer my questions we will get along fine. Now, you did aid, with Mr. James, in the preparation of the material, and gave it to the stenographer, and she wrote the letter, is that right?

A. That is correct.

Q. Now, isn't it a fact that you told Mr. James that you would have to have some other copies of the death certificate?

A. The Coroner's report.

Q. The Coroner's report, as you call it?

A. The coroner's report was incomplete, and did not show the inquest, and we wanted to know why.

Q. And you then attempted to obtain that information from Colorado?

A. Mr. James sent this letter for that information.

Q. And you told Mr. James that it would be necessary to obtain that information, did you not?

A. I did.

Q. And that was the reason for sending this letter, was to obtain that information, is that correct?

A. It was the usual procedure.

Q. Well, that was the procedure that followed in this case?

A. Correct.

Q. Now, at the time that you talked with Miss Wallace [fol. 955] about this insurance, she told you that she had carried a policy for some years with one of your competitors, the Kansas City Insurance Company, did she not?

Mr. Barnes: That is objected to as hearsay.

The Court: Overruled. It is apparently part of the same conversation.

Mr. Barnes: If it is, I have no objection.

Mr. Parsons: Well, I asked for it, at the time you talked with Miss Wallace about this insurance, which you proposed to sell her with the company, the Prudential, did she not tell you that she had a policy of insurance with the Kansas City Life Insurance Company?

A. Yes, she stated she had $1,000.00 with that company.

Q. Well, there is a question in the application, "What other companies do you carry life insurance in?", and that was one of the questions?

A. It should be.

Q. Yes. As a matter of fact, the company will attempt to void a policy, unless they have. ill they not?

Mr. Barnes: That is objected t. on the ground——

The Court: I think that calls for a conclusion.

Mr. Barnes: Well,——

Mr. Parsons: Well, they void policies, do they not?——

The Court: Same ruling.

Mr. Parsons: —where they haven't received that information?

The Court: It is a conclusion of the witness. It is a [fols. 956-969] question of law whether they can be voided, or not.

Mr. Parsons: This is a question of fact, whether they do or not, whether he knows. All right.

A. I might ask to change my answer to your previous question.

Mr. Parsons: Very well.

A. I knew about it, but whether I knew before or after, I can't state.

Q. As a matter of fact, at the time of this conversation she did tell you that she had an insurance policy, did she not, with another company?

A. I don't remember.

Q. And wasn't it at that time and place that she said to both you and Mr. James that she would much prefer to take out the insurance with the Kansas City Life, because she had a policy with them for some seven or eight years, and is it not a fact that Mr. James then said, "Well, Mr. Pries has been a customer and a friend of mine for years, and I have a policy with them, and I would like to have you take the policy with the Prudential, through my friend, Mr. Pries." In substance was that not said?

A. The latter part of your question was, but the first part, I don't think so.

Q. Now, what part was not?

. . . . . .

[fol. 970] DR. A. F. WAGNER, recalled as a witness in behalf of the People, having been previously sworn, testified as follows:

Cross-examination (Continued):

By Mr. Clark:

Q. Doctor, directing your attention to your statement made here when you were on the stand the other day, as to the cause of death of the woman whom you know as Mary James, I notice that you stated that the cause of death was "drowning, with cellulitis as the contributing cause", as I got your testimony. Is that right?

A. I think it is, yes, sir.

Q. Now, may I say with regard to the cellulitis, whether or not that is of such a character as might cause a person to become dizzy, or faint?

A. Well, a great many things can cause people to become dizzy and faint. No one can say any particular condition, but faintness and dizziness has been present in a great many different diseases and afflictions, and there is no way of knowing whether this condition that she had at the time would not have caused her to be faint and dizzy.

Q. Well, Doctor, in the case of semi-alkaloidal poison, [fol. 971] there is a different sort of effect, is there not?

A. Yes.

Q. And there is in the case of black widow spiders, is there not?

A. Yes.

Q. There is in the case of tarantulas?

A. Well, I don't know much about tarantulas.

Q. Well, now, you spoke of cellulitis being a contributing cause, and you mean by reason of that condition the drowning was shorter, or quicker? Is that about it?

A. I mean that the drowning was so complete that we would put it down as the cause of death without any cellulitis. But with this cellulitis being present, it would naturally have to be added as a contributing cause.

Mr. Clark: Now, if your Honor please, there were two or three questions which I was going to ask the Doctor, and which logically would be a part of our case in chief, but since he is here, and since he is a busy man, I will ask those questions now.

The Court: If no specific objection is offered, you may do so.

By Mr. Clark:

Q. Doctor, what are the lymphatics?

A. They are matters that go through the tissues, and that go through the blood and pick up the waste material.

Q. Do they consist of a network through which the blood flows?

[fols. 972-989] A. Yes, sir.

Q. And they extend to all parts of the body?

A. Yes, they extend to all parts of the body.

Mr. Clark: Now, I think I am through with the Doctor, your Honor.

Mr. Barnes: No questions.

Mr. Clark: Did I understand that Dr. Boehme is here?

Mr. Barnes: Yes, he is here.

* * * * * * *

[fol. 990] STIPULATION RE PEOPLE'S EXHIBIT 4

Mr. Williams: If your Honor please, referring to the People's Exhibit No. 4 for identification, which consists of envelope and letter that has been testified to as having been found in the premises at 1329 West Verdugo Boulevard in the afternoon when the body was discovered, counsel has offered kindly to stipulate that the handwriting which appears in pencil on the envelope and the letter itself were in the handwriting of Mary James, the deceased. We accept that stipulation. Is that right, Mr. Parsons?

Mr. Parsons: That is true; so stipulated.

Mr. Williams: At this time we offer in evidence People's Exhibit 4 for identification.

* * * * * * *

[fol. 991] Mr. Williams: Well, I will read this if I can. It reads this way: "Dear sis: Just a line this morning to let you know I am pretty sick." Is that sick?

A Juror: Is that "sick"?

Mr. Parsons: The jurors cannot hear you. Sit in the witness box.

Mr. Williams: "Dear Sis: Just a line this morning to

'et you know I am pretty sick. My leg is all swollen. Something bit me while watering my flowers this morning. I cut my toe yesterday, and having lots of bad luck. It is ole blue Monday, but my daddy will be home early tonight and he takes good care of me. Be sure and write me soon. I will let you know how I get along."

[fol. 992] On the envelope, on the front, is "Mrs. R. H. Stewart, Las Vegas, Nevada, P. O. Box 1225", and on the back, "From Mrs. R. S. James, 522 West 8th Street, Los Angeles."

Now, may I show these to the jurors, if your Honor please?

The Court: You may do so.

(Letter and envelope examined by the jury.)

Mr. Williams: Call Madge Reed.

* * * * * * *

[fol. 993] MOTION TO STRIKE

Mr. Clark: If your Honor please, at this time I wish to move to strike out all of the testimony of the witness J. D. Rogers, upon the ground that the same is irrelevant to all of the issues in this case, and is incompetent for the purpose of establishing any fact herein. There will be a number of similar motions. I hope not to indulge in any extended argument. I do wish to point out clearly and unmistakably, the grounds upon which all of these motions are based. After some brief argument upon this one, the principles and authorities will have been called to your Honor's attention, and there will be no occasion for any discussion of the evidence. This evidence has been received by the Court, over our objection, upon the ground that it is, although evidence of another offense, competent to establish facts at issue here; competent, I think the Court suggested, for the dual purpose of showing motive for the commission of the second murder, and showing a common plan and system animating and underlying both murders. That assumes, of course, that the Colorado murder was a murder. And, as I understand, and have pointed out in argument heretofore, and I believe I have shown your Honor authorities which sustain the same, that when counsel attempt to prove another similar offense, they are not

[fol. 994] permitted to prove merely circumstances, or more or less suspicion, or circumstances which might tend, in a greater or less degree, to show that another offense of the same class was committed, but that their evidence must be specific and complete, so as to establish all of the elements of the other alleged offense.

If this defendant were upon trial for a murder committed in Colorado, he would be confronted with evidence which is wholly circumstantial. The rule in regard to such evidence is so familiar, and your Honor has stated it so many times, that the citation of what the rule is would be entirely superfluous. Where circumstantial evidence is relied upon, the circumstances must be such as not merely possible that the crime was committed, but there must be such testimony that is inconsistent with any reasonable hypothesis against guilt.

Mr. Barnes: Against innocence.

Mr. Clark: Yes, against innocence. This is the burden which the prosecution assumed in endeavoring to introduce this line of evidence which has now taken some days to produce, and which is of a character highly prejudicial to this defendant.

At the conclusion of their evidence we find a series of circumstances which neither singly or collectively are incompatable with the complete innocence of the defendant. They find an automobile injured on the road coming down from Pike's Peak, and some other automobiles have been in-[fol. 995] jured on that road. They find some footprints, after nine men besides this defendant had been running over the ground. They find some bloodstains on the outside of the car, and they find similar conditions in the car. They find a hammer in the car which might have been used for the purpose — making a path. The defendant has never been interrogated as to whether he made the footprints, or not, and there is no evidence that the footprints corresponded with the size of the defendant's foot, and the defendant was not interrogated as to knowledge concerning the bloodstains, and was not interrogated as to how the hammer came to be there, and the first explanation was incomplete.

The wife received severe injuries in the head, while go-down the road of the Rocky Mountains, and the evidence, both oral and photographically, shows that the term "Rocky" is appropriate to that particular region. It is

largely a mass of rocks. The witness by whom these facts are proved saw so little at the time of the circumstances that he made no report, and in reporting the matter to his employers, reported it as an accident.

That, in brief, is the testimony of the first Mr. Rogers. The testimony of the second Mr. Rogers is to the effect that he was employed at Leonard's Grocery Store, at the town of Manitou, where the defendant had temporarily taken his residence for reasons disclosed by another of these witnesses. The store was located across the street from the [fol. 996] postoffice of that town. The town is a summer resort, and the summer season was practically over. The defendant, on more than one occasion, after going to the postoffice for his mail, came over to the store and ordered his groceries. He was living a little ways from the store on the top of the hill.

The boy went with the accused to the house, made the delivery, entered through the kitchen, and was called in the bathroom where the body of Mrs. James was lying in the bath tub. The two carried her in to the bedroom. The boy, in giving his testimony, testified that the door between the bathroom and the kitchen was closed, and the testimony caused some trepidation upon my part, for I understood him that it was the door between the bedroom and the bathroom that was closed, and that would be a circumstance of some importance. Upon his cross examination, however, it developed that when carrying her into the bedroom he was the one who first passed through the passage, separating the bedroom from the bathroom. The water in which she was was filled with soap, and the body was slippery. She was a large woman, and he kept hold of her body until he passed into the living room, proving that the door between the bedroom and the bathroom, therefore, was open. That is a necessary consequence of that testimony.

The witness, the proprietor or manager of the hotel [fol. 997] at Colorado Springs, had a conversation with this defendant as late as the hour of 4:00 o'clock on the afternoon that the body was discovered, a circumstance to which I attach great importance, because the defendant had no automobile. It is not shown that he had any other vehicle, or vehicular means of conveyance. The presumption of innocence implies all of the facts necessary to in-

nocence. A fact not proved is presumed, in accordance with that presumption, not to — existed, and there being no proof, the presumption of innocence compels the conclusion that he had no means of covering that six miles, except by his own personal means of locomotion, that is, by his own feet. It would have therefore been a physical impossibility for him to have been at the house at any time when we could assume that the woman met her death.

There the water in the tub, your Honor will remember, was still luke warm when the boy helped remove her body. The body was still warm. The appearance of life was still there to the extent that there was some discussion between the boy and Mr. James as to whether death had ensued.

I am not going to dwell much upon the conversations that this hotel man related, although it does appear that in those conversations Mr. James gave many explanations reasonable, plausible, and uncontradicted. He removed his wife from the hospital under the spur of necessity. His money had been lost out of his pocket in the accident. He [fol. 998] was unable to pay the bills for her care. He went to Colorado Springs upon the occasion that the last conversation was held for the express purpose of obtaining money by reason of an insurance policy upon which a loan could be made, as I understand, during the life of the insured.

There remains only to be mentioned the testimony of Miss Yarnell, whose most significant fact, as it appears detached, and perhaps the most prejudicial, was the defendant kissing, and offering to kiss her upon occasions during his wife's lifetime, but that is to be interpreted in the light of the conduct of Miss Yarnell, herself, who, at his solicitation, wrote a letter to the insurance company with regard to the very insurance that is the subject of inquiry in connection with her death. That certainly shows conduct on Miss Yarnell's part that she believed the death was the result of murder, and the letter was an attempt to perpetrate a fraud upon the insurance company. That circumstance, it seems to me, of itself, more than all of the other testimony of Miss Yarnell, characterizes the circumstances known to her as being purely innocent, and as to the improper advances made toward her, your Honor has referred me to certain cases in which a person entered into a definite relation, not a mere advance, not a mere detached act, but the entering into a continuous relation shortly

after the death of the wife; that has been received as evidence, the Court saying that such conduct tended to show [fol. 999] the lack of love for the wife. Miss Yarnell, according to her testimony, kissed the defendant goodbye in public upon the occasion when he left the place where he was then residing, and that public kiss is a part of the evidence, a part of the chain of circumstances have just as much to be considered by the jury as the unfavorable circumstances.

The Court: I don't recall that testimony, Mr. Clark.

Mr. Clark: It was the very last thing that Miss Yarnell testified to when she was cross examined by Mr. Parsons.

Mr. Barnes: I have a recollection of it.

Mr. Parsons: I asked her about it, at the depot.

Mr. Barnes: At the depot.

The Court: Well, I didn't recall it in that same form. You may go ahead, Mr. Clark. I think we can find it.

Mr. Clark: I have now, your Honor, only to call your Honor's attention to the case of People vs. Staples, 149 California, 405, with which your Honor is already familiar, and the later and rather interesting case that I think your Honor has frequently considered, of People vs. Robbins, 171 Cal. 466. The latter case is a case in which circumstantial evidence was held insufficient to support the testimony of an accomplice. The former case was a case in which the circumstances were held wholly insufficient to support a conviction of murder of the defendant's wife, in a case similar to this, in which, however, the theory was that the wife had been killed by means of poison. I [fol. 1000] am not going to take the time of your Honor to draw a parallel between the set of circumstances in the one case, and this.

The Court: I have found the testimony in the transcript. The testimony is that he kissed her goodbye, not that she kissed him.

Mr. Clark: It seems to me that it is a distinction without a difference.

The Court: I think it makes quite a lot of difference. I think there are many occasions when women are kissed by men where they would not have kissed the men who kissed them. I might take judicial notice of that.

Mr. Clark: I have had no such unhappy experience.

The Court: Maybe you never tried.

Mr. Clark: Maybe my efforts have been governed with sound judgment.

Mr. Silverman: Mr. Clark, the Court said he would take judicial notice of the kissing.

Mr. Clark: Well, at any rate, the concluding thing I have to say upon this motion is that it is easy to draw a parallel between this case and the circumstances in each of those. To my mind the analogy is almost, if not quite, perfect. If this defendant were upon trial for the murder of that wife on the evidence that is before your Honor, and a verdict of conviction was returned, I would entertain not the slightest doubt that the evidence was wholly insufficient to sustain the conviction. That is my personal opinion of [fol. 1001] the law, which has proved to be wrong many times, and may be at this time. That, however, is the reason for the motion.

In the case in 114 California, to which I called your Honor's attention——

Mr. Barnes: Is that the Staples case?

Mr. Clark: No, this is the Whiteman case, the case that I cited the other day. People vs. Whiteman, 114 California, 338. In this case, with regard to this class of evidence, and with regard to the objection which, as a matter of precaution I made, or tried to make when this evidence was offered, namely, that the offer was an offer to show detached circumstances merely—I think I am in error as to the case in which the thing was held, but in one of the cases I presented to your Honor there, it was held that it could only be ascertained that a complete crime could not be proved after the evidence was all in, and that the real remedy was a motion to strike. Having that warning, it has seemed necessary to make the motion at this time. I think I have covered the matter fully.

Mr. Williams: May I say one other thing? I stated a few moments ago, in response to Mr. Clark's question, that the evidence which we had offered was all of the evidence which we intended to offer. I might say that in making that statement I overlooked the fact that we might ask Dr. Decker to explain what is shown in the x-ray pictures which are already in evidence.

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[fol. 1002] The Court: I might suggest this idea, just in passing, Mr. Clark, and that is an interesting question which

is allied to the motion, is as to whether in those cases in which there is evidence of other offenses, whether those other offenses must be proved beyond a reasonable doubt, and with the same degree of certainty as the instant case on trial?

Mr. Clark: There seems to be authority to that effect, your Honor.

The Court: I am just merely suggesting that as a subject of argument by both sides.

Mr. Williams: May I make a suggestion along that line for consideration? That is, that I think there is a tendency on the part of every one to lose sight of the real point of [fols. 1003-1005] admissibility of the evidence.

The Court: Do not misunderstand me, Mr. Williams. I tried to conceal any thought that I might have on the subject.

* * * * * * *

[fol. 1006] Mrs Madge Reed, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Mrs. Madge Reed.

Direct examination.

By Mr. Williams:

Q. Mrs. Reed, will you kindly speak as loudly as you can so that all of counsel, and the members of the jury may clearly hear what you say?

A. Yes, sir.

Q. Do you know the defendant, Robert S. James?

A. Yes, sir.

Q. When did you first meet him?

A. On the 10th of July.

Q. What year?

A. 1935.

Q. Where did you meet him?

A. At the Italian Village.

Mr. Parsons: What was that answer, please?

A. At the Italian Village.

By Mr. Williams:

Q. Was it day or night that you met him there?

A. It was in the afternoon.

Q. And did you stay in his company for some length of time?

[fol. 1007] A. My girl friend and I had a few drinks with him at the village.

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By Mr. Williams:

Q. Did you do anything besides have drinks with the defendant at the Italian Village?

A. I talked to him.

Mr. Clark: I am not able to hear the answer of the witness.

A. I talked to him there.

By Mr. Williams:

Q. How long did you stay at the Italian Village with him?

Mr. Clark: That is objected to as immaterial and irrelevant.

The Court: Overruled.

A. Oh, I imagine until about 5 o'clock.

By Mr. Williams:

Q. And from there—did you leave the Italian Village in company with the defendant?

Mr. Parsons: That is objected to on the ground that it is incompetent, irrelevant and immaterial.

The Court: The same ruling.

[fol. 1008] A. He was quite intoxicated and he asked my girl friend and I to drive him home.

By Mr. Williams:

Q. Did you have any conversation as to where he lived?

A. He told us that he was——

Mr. Parsons: That is objected to on the same ground.

The Court: Just a moment——

A. And visiting——

The Court: Objection overruled.

Mr. Williams: How far did we get?

A. He told us that he was visiting from Kansas City and was out here on a vacation and that he lived with his sister on Verdugo Road.

Q. Where did you go from the Italian Village?

A. My girl friend drove to Western and I drove him home.

Q. And when you got to the house on Verdugo Road, what did you do?

Mr. Parsons: That is objected to upon the ground it is immaterial and irrelevant.

The Court: Overruled.

A. We went into the house and he went to the bedroom and said he was going to sleep and I worried how he was going——

By Mr. Williams:

Q. Never mind about how you were worried. Just tell us what you did.

Mr. Clark: The same objection.

The Court: Overruled.

[fol. 1009] A. He told me to take the car and go out and get my dinner and maybe he would be able to feel better and return me to town, and I did that and I came back and he was still sleeping, and in a short while, someone came in the door.

Q. A man or a woman?

A. A woman who hollered "Oh, honey"——

Mr. Clark: Just a minute; that is hearsay.

The Court: This is hearsay.

A. Well, it was his wife.

Mr. Williams: Well, we will agree to strike that out at this time.

The Court: It may be stricken.

By Mr. Williams:

Q. Now, this lady that came in there, was there for some time, was she?

A. She wasn't there when I arrived out there.

Q. I mean after she arrived there, did she stay there for some time?

A. She took me back to the mountain road where I took a bus home.

Q. Now, did you see the defendant again after that?

A. Not until the 11th of August.

Q. Well, did you talk with him again?

Mr. Clark: What was the last answer?

Mr. Williams: Not until the 11th of August.

Q. Did you talk with him again?

The Court: You can answer that "yes" or "no".

[fol. 1010] A. By phone.

By Mr. Williams:

Q. When did you next talk to him?

Mr. Parsons: That is objected to on the ground that it is irrelevant.

The Court: Overruled.

A. I beg your pardon?

By Mr. Williams:

Q. When did you talk to him the next time after the 10th of July?

A. On numerous occasions.

Q. When was the first time? I am talking about telephone conversations.

A. Well, he called me on numerous occasions and the last time was the Saturday before his wife's death, but the first time he called me was the day following the 10th of July.

Q. What did you say over the telephone or what did he say over the telephone?

Mr. Clark: That is objected to on the ground it is irrelevant.

The Court: Overruled.

A. He apologized——

By Mr. Williams:

Q. Just tell us what he said.

A. Oh, he apologized for taking me out there to his place and asked me to go to San Diego with him.

Q. And what else did he say, if anything?

Mr. Clark: That is objected to upon the ground that it is irrelevant and immaterial.

The Court: Overruled.

[fol. 1011] By Mr. Williams:

Q. Did he say anything on the subject of the lady who came into the house?

A. Yes, he said that was his wife, and that he didn't think she would be home because she was at a convention in Long Beach and would not return for three days.

Q. Did he call you again after that?

A. Yes, sir.

Q. How many times did he call you before the 3rd of August?

Mr. Parsons: We object to it on the ground that it is immaterial and irrelevant.

The Court: Overruled.

By Mr. Barnes:

Q. Was it more than one time?

A. Yes.

Mr. Parsons: That is objected to on the same ground.

The Court: The same ruling.

By Mr. Williams:

Q. What did he say to you on these occasions when he called?

A. He wanted to go out with me.

Mr. Clark: I object to that as immaterial and irrelevant.

The Court: Overruled.

By Mr. Williams:

Q. Now, did he call you on three occasions?

A. Well, the Saturday before his wife's death if that was the date of her death.

Mr. Clark: Well, I will stipulate that was the date.

By Mr. Williams:

Q. What did he say when he called you on the 3rd of [fol. 1012] August?

Mr. Clark: That is objected to on the ground that it is irrelevant and immaterial, as to what he said.

The Court: Overruled.

A. He said to get a girl friend and the four of us would go out together.

Q. Did you hear from him after that?

A. No, not until the 11th of August.

Q. And on the 11th of August did you have a telephone conversation with him?

A. Yes, he called me and asked me——

Mr. Clark: Just a moment.

The Court: The same objection will be assumed as being made and overruled.

Mr. Clark: All right.

By Mr. Williams:

Q. What did he say on the 11th of August?

A. He asked me if I had been reading in the papers about his wife's death and I replied that I had and he said he wanted to talk to me about what was in the papers and wanted to come up and I said he could not, but he came up anyway.

Q. Where did he come?

A. 525 South Corondolet, to my apartment.

Q. Did you and he have a conversation in your apartment?

A. Yes, sir.

Q. What did he say and what did you say?

Mr. Clark: That is objected to upon the ground that it is [fol. 1013] irrelevant and immaterial.

The Court: Overruled.

A. Well, he told me about his wife and how they were trying to frame him on the case; and he said he didn't believe in mourning, and that as long as his wife was dead that he would collect the insurance and he would marry me and take me north.

By Mr. Williams:

Q. Was that the substance of what he said before you left the apartment house?

A. Yes, sir.

Q. And then did you leave the apartment house?
A. Yes, sir.
Q. And where did you go?
A. We went for a ride.
Q. In the car?
A. In his automobile.
Q. While you were riding, did you have any further conversation with him?
A. Yes.
Q. What was that conversation?

Mr. Clark: That is objected to on the ground that it is irrelevant and immaterial.
The Court: Overruled.

A. Well, he told me that if he was indicted, he wanted to spring me as a surprise witness, and he would give me $2,000.00 if I would testify.

[fol. 1014] By Mr. Williams:

Q. Did he tell you what he wanted you to testify to?
A. Yes, sir.
Q. Relate the conversation.
A. He said that he wanted me to testify that I had met he and his wife five weeks previous at the Italian Village at 9 o'clock in the evening and that to say on the morning of her death I was out for a ride and seen her standing on the porch and that she explained that she was not feeling well and that she had on yellow pajamas and she laid in the hammock and mentioned that she had a sore on her leg.

The Court: I didn't catch that.

(Answer read by the reporter.)

Mr. Clark: I wonder if you will have the witness speak up.
The Court: Speak a little slower, please.

By Mr. Williams:

Q. Was that the extent of the conversation that you had in the automobile?
A. He talked about many things.
Q. From the automobile where did you go?
A. Towards Hermosa Beach.
Q. Where did you go?
A. He asked me to register at a hotel.

Mr. Clark: Just one moment; I move to strike that out on the ground that it is irrelevant and immaterial.
The Court: Motion denied.

By Mr. Williams:

Q. Did you do that?
[fol. 1015] A. Yes.

Mr. Clark: That is objected to as immaterial and irrelevant.

By Mr. Williams:

Q. And what did you do after you registered?

Mr. Clark: The same objection.
The Court: Overruled.

A. Talked.
Q. Did you go to a room in the hotel?
A. Yes.
Q. While you were there did you have a conversation with the defendant?
A. Yes.

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Q. Just tell us what he said there.
[fol. 1016] A. Well, he said that they were trying to frame him on his wife's death, and talked over the case about me being a witness for him. He talked about insurance, what a marvelous thing it was to have, and that they were trying to frame him on that point.
Q. Now, did you spend the rest of the night there at the hotel?
A. Yes.
Q. And in the morning did you return to the City of Los Angeles?
A. Yes, sir.
Q. With the defendant?
A. Yes, sir.
Q. Did you have any conversation with him on the way in?
A. Yes, he had me take notes on a card so that I would remember to say when I met him and his wife, and he gave me Mr. Silverman's name and phone number.
Q. And after that, what did you do?
A. I came back to town.

Mr. Parsons: Pardon me, if your Honor please, I don't want to interrupt. May I have the last answer read?

(Answer read by the reporter.)

Mr. Parsons: Tha answer just before that, if I might, your Honor?

(Questions and answers read by the reporter.)

[fol. 1017] Mr. Williams: Now, did you make the notes on the card in his presence?

A. Yes sir, in his presence and he gave me $60.00 to show that he really meant business, and I was to get the $2,000.00 whether I testified or not.

Q. And then you left him, did you?

A. Yes, I took a taxi home.

Q. And now, I will show you a card which I will ask your Honor's permission to mark with a number for identification.

The Court: 73.

Mr. Williams: 73 for identification and ask you to examine that and state whether you recognize that.

A. Yes.

Q. The words that are written in there in ink, that is, the names and addresses, are those in your handwriting?

A. Yes, sir.

Q. Is that the registration card at the hotel where you registered the night you were there with Mr. James?

A. It is.

Q. That is your handwriting, is it?

A. Yes, sir.

Mr. Williams: We offer it in evidence, if your Honor please.

Mr. Clark: To which we object on the ground that it is incompetent.

The Court: May I see the card, Mr. Williams?

[fol. 1018] (Mr. Williams hands card to the Court.)

The Court: Objection overruled. Mark it 73 in evidence.

Mr. Williams: May I approach the bench with counsel?

The Court: Yes.

(Discussion at bench.)

The Court: Let the record show merely this, that an exhibit shown me by Mr. Williams in the presence of Mr.

Parsons was shown together with the comment that someone had written something on the exhibit after it came into Mr. Williams' possession that didn't belong there. The suggestion was made by the Court that this be erased.

Mr. Williams: May I have this card concerning which your Honor has just made the statement marked as People's Exhibit 74 for identification?

The Court: So marked.

By Mr. Williams:

Q. I will show you now a card, People's Exhibit No. 74 for identification and ask you whether you recognize that.

A. That is the card I took the notes on on the way back to town.

Q. And the portion which is written on this card in handwriting, in ink, was written by whom?

A. By myself.

Mr. Williams: This is offered in evidence at this time, if your Honor please.

Mr. Parsons: We object to it as incompetent, irrelevant [fol. 1019] and immaterial and too remote.

The Court: Objection overruled.

* * * * * * *

Cross-examination.

By Mr. Parsons:

Q. It is Mrs. Reed, is it not?

A. Yes, sir.

Q. And when this occurrence took place you lived at 525 South Corondolet here in the city?

A. Yes, sir.

Q. And you state that you met Mr. James one afternoon at the Italian Village?

A. Yes, sir.

Q. That is the establishment on Fourth Street just off of Hill?

A. It is on Eighth Street.

Q. Where on Eighth?

A. Between Hill and the next street.

Q. And at about what time of the day was it that you met him?

A. Sometime during the afternoon.

[fol. 1020] Q. Sometime during the afternoon?

A. I went down for lunch, about 1:30. It was shortly after that.

Q. About 1:30, or 2:00 o'clock?

A. A little later, perhaps.

Q. Now, Mrs. Reed, you had a girl friend with you, did you?

A. Yes, sir.

Q. And what was her name, please?

A. I promised her not to tell and I am keeping my promise.

Q. I am afraid that we must ask for her name.

Your Honor, may we have the witness answer the question? I think we are entitled to know the name.

The Court: I think you are entitled to know the name of the person if you insist on it.

Mr. Parsons: We insist on it.

The Court: You may answer.

A. Merryl Barrow.

Mr. Parsons: How do you spell it?

A. M-e-r-r-y-l B-a-r-r-o-w.

Q. Where did she live?

A. I don't know her right address.

Q. Where did she live at that time?

A. Some place near Western.

Q. Do you know on what street?

[fol. 1021] A. No.

Q. Do you have any idea what street it was?

A. I really haven't.

Q. Did you meet her there by appointment?

A. Yes.

Q. And how did you communicate with her to make the appointment?

A. By telephone.

Q. And what was her telephone number?

A. I have forgotten.

Q. You have?

A. Yes.

Q. And do you have any memorandum of it?

A. I have it at home.

Q. You haven't lost it or destroyed it?
A. I don't believe so.
Q. You are quite sure that it is there now?
A. I couldn't say positively.
Q. Do you know where her husband is employed?
A. No.
Q. How long had you known her?
A. I had met her at the Village once before. We eat at the same table.
Q. That is the only time that you had met her?
A. Yes.
Q. Now, you met this man and you had a few drinks, is [fol. 1022] that right?
A. She met him first and he wanted an introduction and she brought him over to my table.
Q. And you were introduced?
A. Yes, sir.
Q. And had a few drinks?
A. Yes.
Q. And some time later in the afternoon, Mr. James asked you to drive him out home, is that right?
A. Yes, he was too intoxicated to drive himself.
Q. Well, did he tell you that he felt he had had a little too much to drink and it would be necessary for someone else to drive him home, is that it?
A. Yes.
Q. And then you went out to his home, did you?
A. He said he was living with his sister on Verdugo Road.

Mr. Parsons: I move to strike it out as not responsive.
The Court: The answer will be stricken.

Mr. Parsons: Did you then go out to some address at La Canada?
A. Yes.
Q. Do you know the address?
A. No.
Q. How is that?
A. I don't know the address right now.
Q. You don't know it right now?
[fol. 1023] A. No.
Q. Have you been there since this occurrence?
A. Never.

Q. When you reached there you went in the house and you were somewhat alarmed over not having had your luncheon, and told him that?

A. Yes.

Q. And he gave you a dollar and told you to take the car and go out and get something to eat, is that it?

A. Yes, sir.

Q. And when you returned you found him sound asleep, is that right?

A. Yes, sir.

Q. And then some time later in the afternoon a lady came to the house, is that right?

A. Yes.

Q. And she took you down to the street car, is that right?

A. That is right.

Q. And now, you state that you had a conversation with Mr. James on August 3rd, as you stated, the Saturday before you learned of the death of Mrs. James, is that right?

A. That is right.

Q. And that was in the evening, that conversation, was it not?

A. Yes, sir.

[fol. 1024] Q. Was it along about 6:00 or 7:00 o'clock?

A. I wouldn't know what time it was.

Q. Well now, can you give us your best judgment about what time?

A. In the evening?

Q. Well, about what time?

A. I couldn't even guess.

Q. Well, was it near the dinner hour or 6:00 or 7:00?

A. Around there.

Q. Around 6:00 or 7:00. And then you learned of the death of Mrs. James and you heard from him sometime after that, is that right?

A. On the 11th of August.

Q. And did you make any memorandum of that, the 11th of August?

A. Of course.

Q. Did you write that down in a diary or something?

A. No.

Q. You just made a mental note of it?

A. Yes, sir.

Q. And where did you see him on the 11th of August?

A. He came to my place.

Q. He came to your place?
A. Yes.
Q. To your apartment there on Corondolet?
A. Yes, sir.
[fol. 1025] Q. What apartment was that?
A. 525.
Q. What number?
A. 525.
Q. 525, thank you. And he was there how long?
A. Oh, perhaps an hour.
Q. And then you and he went for a ride?
A. Yes, sir.
Q. Is that right?
A. Yes.
Q. You went down to Hermosa Beach, is that right?
A. Yes.
Q. And this card, Exhibit 73, do I understand that the signature thereon contained, "Mr. and Mrs. Joseph Wright, San Francisco, California", was the name and address put down by you?
A. At his instructions.
Q. But in any event you did write it, didn't you?
A. Yes, sir.
Q. And was that any new experience for you?

Mr. Williams: Objected to as immaterial, not proper cross-examination.

The Court: Objection sustained as to the form of the question.

Mr. Parsons: You had done that before, had you not?
A. I had not.
[fol. 1026] Q. You are sure of that, are you?
A. I am positive.
Q. And this card was in what hotel?
A. Hermosa.
Q. In the Hermosa Hotel?
A. At Hermosa Beach.
Q. At Hermosa Beach. Had you ever been there in that establishment before?
A. I had not.
Q. Now, when you were asked to write this registration at the hotel you did it, did you not?
A. Yes, sir.

Q. And you and Mr. James were shown to a room, were you?

A. Yes.

Mr. Parsons: May we take the afternoon recess at this time, your Honor?

The Court: Yes, we will take our afternoon recess at this time. The jury will heed the admonition heretofore given.

(Recess.)

(After recess.)

The Court: The record may show all parties present. Mrs. Reed may resume the stand.

Mr. Clark: I may state to your Honor that the case that I spoke about is Criminal number 2782, decided by the District Court of Appeals of this district.

The Court: I tried to find something that would perhaps [fol. 1027] resemble the situation, but could not find anything recent. Will you proceed with the cross-examination?

Cross-examination (Continued).

By Mr. Parsons:

Q. Now, Mrs. Reed, after you registered, you people were shown up to the room, is that right, at the hotel?

A. Yes.

Q. And this was at about what time of the evening?

A. I couldn't say.

Q. You couldn't say?

A. It was approximately 8:00 or 9:00.

Q. About 8:00 or 9:00 o'clock in the evening?

A. Approximately; I couldn't say for sure.

Q. Well, was it at least after the dinner hour?

A. I believe it was after the dinner hour, yes.

Q. And you had driven directly from Los Angeles down to Hermosa Beach, had you?

A. I stopped several times and made phone calls.

Q. And in any event, in an hour and a half or two, you reached Hermosa Beach, is that right?

A. I don't know the exact time.

Q. Well, when you registered at the hotel did you have any baggage?

A. No.

Q. Any suitcase?

A. No.

[fol. 1028] Q. Nor over night bags?

A. No.

Q. What was paid for compensation for use of the room, do you recall that?

A. I don't know.

Q. Well, did you observe whether or not any money was passed?

A. I imagine he paid for the room.

Q. The question is, did you see it done?

A. I don't recall.

Q. You don't recall?

A. I wasn't watching every move.

Q. You were watching every move?

A. I say, I wasn't watching every move.

Q. Oh, you weren't watching every move. You were paying little or not attention to it, is that right?

A. (Witness nods head.)

Q. You will have to speak out audibly so that the reporter can get it.

A. Yes.

Q. Did you observe whether it was a man or a woman upon the desk at the hotel?

A. It was a man.

Q. Can you give us some idea of how old he was?

A. Middle aged.

Q. About middle age. Did he show you folks up to your [fol. 1029] room?

A. Yes.

Q. And what floor was it on?

A. I don't remember.

Q. You don't remember? Did you walk up or ride up in the elevator?

A. Walked.

Q. You walked up and he took you folks up to the room and let you in, is that right?

A. Yes.

Q. And when next did you leave the room?

A. The next morning.

Q. And the gentleman who was with you didn't leave either that night, did he?

A. No.

Q. And you say that after you reached the room you had considerable conversation, is that right?

A. Yes.

Q. And how long did that keep up?

A. Most of the night.

Q. Most of the night. And did you folks go to sleep, or did you sleep?

A. I don't see where that has any bearing on this case.

Mr. Parsons: I insist upon the question.

The Court: Answer the question.

A. I did.

[fol. 1030] By Mr. Parsons:

Q. And did you and this gentleman have sexual relations?

A. No.

Q. No?

A. No.

Q. Did you—When you slept, did you take off any of your clothing?

A. My dress.

Q. Just your outer dress?

A. Yes.

Q. And did you take your shoes off?

A. Oh, yes.

Q. And your stockings?

A. Yes.

Q. That is all?

A. Yes.

Q. Nothing else?

A. No.

[fol. 1031] Q. Then did the gentleman take off his clothing?

A. I don't remember.

Q. You don't remember whether he did or not?

A. No, I do not.

Q. And did he lie down with you—pardon me, on the same bed?

A. He was sitting talking, the last I remember.

Q. When you last saw this gentleman he was sitting and talking?

A. Yes.

Q. And you don't know whether he retired to the bed, or not, is that right?

A. No, I don't think it is quite necessary to answer that.

Q. I am sorry, lady.

The Court: You have to answer the question.

A. I don't know.

By Mr. Parsons:

Q. You don't know?

A. No.

Q. About what time did you folks arise in the morning?

A. We were back to town before 8:00 o'clock.

Q. Before 8:00?

A. Yes, sir.

Q. And where were you left, do you know?

A. At Pico and Hoover.

Q. Pico and Hoover?

A. Yes, sir.

[fol. 1032] Q. You were at that time living someplace in the neighborhood of 9th and Alvarado, were you not; near Lake?

A. No, I was living on Coronado.

Q. You were living on Coronado?

A. Yes, sir.

Q. Did you live on Coronado later?

A. Yes, some months later, in September or October.

Q. In September or October you did move over toward 9th and Coronado, is that correct?

A. Yes, sir.

Q. And do you know of any person who saw you and a gentleman whom you say is Mr. James, on that evening that you went to Hermosa Beach?

A. No.

Q. You can't name a single human being, except the hotel clerk, who saw you, can you?

A. No.

Q. Now, you know Mrs. Joe Marsh, who lives on Gramercy near 9th, don't you?

A. Yes, sir.

Q. And your mother's name was Lily Barrett, was it not?

A. Yes.

Q. And you used to live in Wenatchee, Washington, did you not?

A. Yes.

Q. And you also had some experiences in Salem, Oregon, [fol. 1033] did you not?

A. No, I did not.

Q. Have you ever been in Salem, Oregon?

A. I lived there, yes.

Q. Are you acquainted with a dentist there?

A. Yes.

Mr. Williams: Just a minute. That is objected to as not proper cross examination.

The Court: Objection sustained.

Mr. Parsons: You have been in the barber shop of Mr. James, have you not?

A. I dropped in, yes.

Q. You dropped in. And when was that that you dropped in?

A. I don't remember.

Mr. Parsons: Miss Lois Wright, would you stand up, please?

(Lois Wright stands.)

Mr. Parsons: Will you, Miss Witness, take a look at this young lady, please? Thank you, Miss Wright. Did you ever see that young lady in the shop?

A. Not to my recollection.

Q. And how long were you in the shop?

A. Probably a minute or two.

Q. And while you were there you asked for and received some money from Mr. James, did you not?

A. No.

[fol. 1034] Q. Now, when you visited the shop, was that before or after the death of Mrs. James?

A. Several months after.

Q. Several months after?

A. Yes.

Q. Now, isn't it a fact that after this occurrence that you related, where you said that you met Mr. James at the Italian Village, that you dropped in at the barber shop and asked Mr. James for $10.00, stating that you had spent some money for taxi fare, and thought that he should take care of your expenses?

A. I never.

Q. And what was the object of your visit at the barber shop?

A. Well, he had called me some time before.

Q. He had called you?

A. Yes, sir.

Q. Do you remember when that was?

A. It was at a time when my mother was dying, and I did ask him for money to see her.

Q. Now, your mother was very ill, wasn't she?

A. Yes.

Q. In fact, dying?

A. Yes.

Q. And you went down to see Mr. James, and you told him your predicament, did you not?

[fol. 1035] A. No, I talked to him on the 'phone.

Q. And you told him that you were really up against it for money?

A. To see my mother, yes.

Q. And that you needed it very badly; didn't you tell him that?

A. Yes.

Q. And you tried to——

A. I said inasmuch as he had asked me to commit perjury, and I had given him the impression I would, and he said he would pay me whether I testified or not, that I thought he owed me the money.

Mr. Parsons: May I have that read, please?

The Court: Please read it.

(Question and answer read by the reporter.)

By Mr. Parsons:

Q. Now, did he give you any money?

A. Not then, no.

Q. Now, he did give you $60.00 the morning after the night that you folks sat up down there at Hermosa Beach?

A. Yes.

Q. And you wrote Mr. James a letter or two, did you not?

A. I wrote him one, yes.

Q. And you asked him in that letter for some money, did you not?

A. Yes.

Q. How?

[fol. 1036] A. Yes.

Q. And what did you say?

Mr. Williams: Just a minute. That is objected to.

The Court: Sustained. It is not the best evidence.

By Mr. Parsons:

Q. Now, you did tell Mr. James, did you not, that unless he gave you some money that you would go to the newspapers and attempt to sell your story, didn't you?

A. I don't recall.

Q. Didn't you, in substance, say that to Mr. James?

A. I don't recall.

Q. Would you now tell this Court and this jury that you didn't say that to Mr. James?

Mr. Barnes: That is objected to on the ground there is no foundation laid for it, the witness having answered that she didn't recall.

The Court: Objection sustained.

By Mr. Parsons:

A. And would you say that the only time you discussed money with Mr. James was on the morning after you had been to Hermosa Beach, when he paid you the $60.00, and upon the occasion at the barber shop? Is that right?

A. He came up just before the insurance trial and offered me $100.00 to testify on that.

Q. When was that?

A. That was in November, I believe.

Q. In November?

A. Yes, sir.

[fol. 1037] Q. And you were still seeing him then?

A. No.

Q. And when was the last time that you called at the Barber shop?

A. I don't recall.

Q. You don't recall?

A. No.

Q. Now, to go back to that experience out at the James home, when you were out at the James home, and this lady came in, had you taken off any of your attire?

A. I was completely dressed.

Q. You were completely dressed?

A. Yes, sir.

Q. Now, at the time these occurrences which you have related here, you were not living with your husband, were you?

A. We were separated.

Q. You were separated?

A. Yes, sir.

Q. And he was not paying you any support money, was he?

Mr. Williams: That is objected to as not proper cross examination.

Mr. Parsons: It goes to the financial matters.

The Court: Objection sustained.

By Mr. Parsons:

Q. You were short of money, were you not?

Mr. Williams: The same objection.

[fol. 1038] The Court: You may answer.

A. No, I was not.

By Mr. Parsons:

Q. What income did you have?

Mr. Williams: Objected to as not proper cross examination.

The Court: Overruled.

A. I think some antiques which I disposed of.

By Mr. Parsons:

Q. Some antiques that you disposed of?

A. Yes, sir, and a girl friend was living with me, and paying some expenses.

Q. And who was she?

A. Vera Russell.

Q. Vera Russell?

A. Yes, sir.

Q. And Mrs. Barrow worked in a beauty shop?

A. Probably she does.

Q. And probably she does some of that work?

A. She probably does.

Q. Have you ever visited her there?
A. No, sir.
Q. Did you ever communicate with her there?
A. By 'phone.
Q. Do you know the telephone number?
A. Well, I have it written down someplace.
Q. And did you inquire for that number by looking in the directory?
[fol. 1039] A. No.
Q. You cannot give us any idea, of course, where we might find her?
A. No, I really could not.
Q. You could not?
A. No, I really could not.

Mr. Parsons: That is all Lady.

. . . . . .

CHARLES H. HOPE, recalled as a witness in behalf of the People, having been previously sworn, testified as follows:

Cross-examination (Continued).

By Mr. Clark:

Q. Now, Mr. Hope, I am going to read, with the Court's permission, from your testimony given here before, a few questions and answers, so that you will understand the connection of a few questions which are going to be asked you: "By Mr. Williams:"——

Mr. Barnes: What page is that?
Mr. Clark: Page 165.
Mr. Barnes: And the volume?
[fol. 1040] Mr. Clark: Oh, Volume 3, Line 21.
Mr. Barnes: Thank you.

Mr. Clark (Reading): "Q. By Mr. Williams: And that left you how many boxes in the car? A. One box. Q. Did you do anything with the second box? A. Threw it out along the roadway on Venice Boulevard. Q. Now, did you go back to the James house after that? A. I returned there about 1:30 at night."

Q. That would be about 1:30 in the morning of Monday, August 5th, 1935? Wouldn't it?

A. Yes, sir.

Mr. Barnes: That is objected to as immaterial, and it has been asked and answered.

The Court: It may be preliminary.

Mr. Clark: It is preliminary.

The Court: I will permit the question.

By Mr. Clark:

Q. Now, at that time you stated that Mr. James had been drinking. In that connection I wanted to ask you to what extent he appeared to be intoxicated?

A. The fumes of liquor were quite strong on his breath, and he was very vexed at me.

Q. Was his speech incoherent?

A. What was that?

Q. Was his speech incoherent?

Mr. Barnes: I object to that as being asked before.

The Court: I will permit it to be answered.

[fols. 1041-1042] A. Very much shot, sir.

By Mr. Clark:

Q. He staggered when he walked?

A. I didn't notice him walk at all.

Q. Well, you remained there on that occasion for several hours, did you not?

A. I did, yes, sir.

Q. And you finally left somewhere along about between 7:00 and 8:00 o'clock in the morning as I understand it? Is that correct?

A. Yes, sir.

Q. And do you know whether or not Mr. James was drinking during that period, or not?

* * * * * * *

[fol. 1043] Mr. Clark: I will repeat it, in substance. Was he drinking between the hours of 1:00 and 7:00 o'clock that Monday morning?

A. I can state that I didn't see him take a drink from the hour of 2:00 o'clock, the rest of the night, no.

Q. Did you see him take any drinks between 1:00 and 2:00?

A. I don't know; I didn't get there until 1:30.

Q. Did you see him take any drinks between 1:30 and 2:00?

A. I saw him take a couple with me.

Q. What was he drinking?

A. Whiskey.

Q. And when you saw him at 7:00 o'clock, did he appear to be any less intoxicated than when you saw him at 1:30?

Mr. Barnes: Just a moment. The form of that question is objected to upon the ground that it assumes a fact not in evidence.

[fol. 1044] Mr. Clark: What is it?

The Court: Sustained. That he was intoxicated.

Mr. Clark: Well, when you saw him at 1:30, he appeared to be intoxicated to you, didn't he?

A. I stated I didn't know whether he was mad, or intoxicated.

Q. And after he took the drinks with you, between 1:30 and 2:00, he appeared to be intoxicated, and not mad at you, didn't he?

A. Well, I wouldn't state that he was intoxicated, or mad either. He didn't seem to be so mad then.

Q. But he did seem to be more intoxicated, didn't he?

A. Slightly, yes.

Q. Did he appear to have been drinking when you saw him in the morning about 7:00 o'clock?

Mr. Barnes: We renew our objection on the ground that it has been thoroughly covered. I think the answers that have been elicited already from this witness have probably recalled to the Court's mind the questions that were answered before.

The Court: You may answer.

A. Well, I was so scared in the morning I don't know whether he was drunk, or not.

By Mr. Clark:

Q. You didn't see any difference between his appearance at 7:00 o'clock, and his appearance about 2:00 o'clock, did you?

[fol. 1045] Mr. Barnes: Objected to as calling for a conclusion.

The Court: You may answer whether you did, or not.

A. He seemed extremely nervous, yes.

By Mr. Clark:

Q. His speech still seemed incoherent, didn't it?
A. His speech never was incoherent.
Q. His gait seemed unsteady, didn't it?
A. As I said before, I didn't see him walk, only the time I walked from the kitchen to the fish pond.
Q. Didn't you walk with him when the two of you carried the body out to the pond?
A. That is the time I am talking about.
Q. He staggered then, didn't he?
A. No, sir.
Q. You walked back to the house with him, did you not?
A. No, sir.
Q. You left him at the pond?
A. Yes, sir.
Q. Didn't see him any more that day?

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[fol. 1046] (The following proceedings were had at the bench, out of the hearing of the jury):

Mr. Clark: Here is the situation, your Honor: We expect to prove by several witnesses who saw Mr. James earlier that morning that he didn't appear to be intoxicated, or drunk, and it seems to us that it is one of the very important matters in the case that the testimony of this witness should be very definitely fixed in regard to it. We have no recollection of his having been interrogated with regard to it at that time.

The Court: We are in this situation, Mr. Clark: My recollection is that that was gone into; the extent of it, I don't know. Mr. Barnes is quite positive that it was gone into to considerable extent, and has a digest which will give the reference, and will settle it. You don't have a reference to that portion of the transcript, so you can't afford us anything that will help us. I am going to defer the examination until I can have the reference.

Mr. Barnes: I can have it in five minutes.

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[fol. 1047] Mr. Clark: Now, you were out at Mr. James residence on Sunday, the 7th of July, were you not?

A. Yes, sir, I think that is the date.

Q. You had breakfast there that morning, didn't you?

A. I ate breakfast there one Sunday morning, yes, sir.

Q. Mr. and Mrs. James, and Mrs. Murphy, Mr. James' sister, were all at the breakfast table there, were they not?

A. Yes, sir.

Q. There was some conversation occurred there at that time in regard to Mrs. James being in a delicate condition, wasn't there?

A. I think most of the conversation that morning at the breakfast table was the fact that the man was very severely reprimanding his little niece for being at the beach eating hot dogs, and drinking pop, and was quite ill. I think that most of the entire morning during the breakfast hour was spent in bawling her out about that, and Mrs. James reprimanded him severely for doing so.

Q. By "the niece", you mean Lois Wright?

A. Yes.

Q. She became angry after a while and left the table while the rest of you were seated, didn't she?

A. No, she didn't leave the table. She was serving.

Q. Isn't it true that when she wasn't there there was a conversation in which you took part, and in which Mrs. James being in a delicate condition was mentioned?

[fol. 1048] A. No, sir.

Q. Isn't it true that at that time, and in your presence, Mr. James spoke about having an abortion performed?

Mr. Williams: Just a minute. That is objected to as assuming that the witness testified that that subject of conversation was entered into, by using the words "at that time" in his question.

Mr. Clark: No, I don't think I assumed that. May I have the question read?

(Question read by the reporter.)

A. There was nothing at that time, or at any other time, spoken about that.

Q. Didn't Mr. James, on the date I have mentioned, in the presence of the parties I have mentioned, say that he would not have anything to do with such an operation?

A. I never heard any such conversation like that.

Q. And then didn't Mrs. James say, "Well, if Mr. James wouldn't", you would help her out?

A. I have never heard any conversation of that kind at any time.

Q. And didn't you say, "You bet I will"?

A. I did not.

Q. When you left Mr. James' residence that morning you drove down to Virgil and Burns, did you see at that place any person whom you knew?

A. I did.

[fol. 1049] Q. Whom did you see at that place?

A. I saw the manager at the courts.

Q. What is his name?

A. I don't know.

Q. Was Mr. James with you when you saw the manager of the court?

A. He was not. However, the grocery man across the street saw me get out of the car with Mr. James, and also saw those bundles in my arm, whether he recalls it now or not.

Q. Do you recall his name?

A. No, a Japanese man.

Q. Now, altogether you were up there at Mr. James' place how long?

A. On what occasion, please?

Q. Altogether?

A. About four or five days.

Q. That was all in the summer time, was it not?

A. Yes, sir, in the month of July.

Q. You were cleaning up some around there, as I understand?

A. Some.

Q. Did you see any black widow spiders at that time?

A. I did.

Q. Many of them?

A. Quite a few of them, yes. I don't know whether they [fol. 1050] were all black widow spiders, or not. I saw considerable spiders at that time. At that time I didn't know what a black widow spider looked like.

Q. You say you didn't know what a black widow looked like?

A. At that time.

Q. Well, you learned what a black widow spider looked like while you were there, didn't you?

A. I did.

Q. And after you learned you saw many of them there, didn't you?

A. I wouldn't say many; I saw several, yes. They were in the garage, in the hen house and in the wash house.

Q. Now, during all of the time that you were having conversations with Mr. James, never any word was said between you about killing his wife by any other means than by a rattlesnake bite, was there?

A. There was never any conversation between Mr. James and myself about killing his wife any way.

Q. You never entered into any arrangement looking forward to bringing about her death by any other means than a rattlesnake bite?

A. No, I never entered into any arrangement for the accomplishment of her death in any manner.

Q. You never, until that Monday morning, heard Mr. James say anything—I withdraw that. You were not pres- [fol. 1051] ent at the time that Mrs. James met her death, were you?

A. No, sir.

Q. And you have no certain means of knowledge as to how she met her death, other than what Mr. James told you, have you?

A. No, sir.

* * * * * * *

[fol. 1052] Mr. Clark: When you saw the defendant about the time that your Honor has mentioned the only difference you obeserved between his appearance then and his appearance and manner when you arrived at 8:30 was that at the later hour he seemed more nervous? That is true?

A. Yes, sir.

[fol. 1053] Q. And that is true of his appearance and manner at the time that you left him at Virgil and Burns?

A. No, he qui-ted down by that time.

Q. Otherwise, his appearance was the same?

A. I didn't smell any liquor.

Q. Well, his appearance and manner was the same?

A. Yes, sir, his appearance and manner were the same.

Mr. Clark: That is all.

Mr. Williams: Did he drive his car down to where he left you off?

A. He did.

Mr. Williams: That is all.

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WILLARD L. KILLION, recalled as a witness in behalf of the People, having been heretofore duly sworn, testified as follows:

Direct examination.

By Mr. Williams:

Q. Mr. Killion, what is your occupation?

A. Deputy Sheriff of Los Angeles County.

Q. Attached to what part of the Sheriff's office?

A. The Bureau of Investigation.

[fol. 1054] Q. And you know the defendant, Robert S. James, do you?

A. Yes, sir.

Q. Did you see the defendant, Robert S. James, on the 3rd of May, 1936?

A. I did.

Q. And in what part of the jail did you see him?

A. On the front floor, that is a room adjoining the attorney room.

Q. And who were present at that time?

A. Charles Griffen and Jack Southard of the District Attorney's office, and yourself and Deputy Sheriff Virgil Gray and I were there. As I remember those were the persons present.

Q. Do you remember this Lynch, the reporter?

A. Yes, Mr. Edward F. Lynch, a man from the Sheriff's office.

Q. You know Charles Hope, do you?

A. Yes, sir.

Q. At that time was he brought into the room?

A. Yes, sir.

Q. And at that time was a statement made in your presence of Mr. James and answers made by him?

A. Yes, sir.

Q. Now, was that taken by the shorthand reporter at that time?

A. Yes, it was taken by Edward Lynch.

[fol. 1055] Q. And did you within a day or so thereafter, in your memory, see a transcript of his notes, of the matters that he took for you?

A. Yes, sir.

Q. I show you a transcript and ask you if that is a copy of the transcript that you saw?

A. Yes.

Q. Now, by refreshing your recollection, will you state exactly what was said and by whom, at that time? You can answer that "yes" or "no".

A. Yes.

Q. I will ask you to use the record and see if that will refresh your memory as to detail.

A. Yes, sir.

Q. Now, using the transcript to refresh your recollection, state what was—state who was there and what was said there by the persons there present.

Mr. Clark: I don't want to object at this time, but I direct the attention of the Court to the fact that the witness is using memoranda for the purpose of refreshing his recollection, using a memoranda which we haven't had an opportunity to examine.

The Court: Well, I don't know as there is anything that entitles you to see the memorandum, except for the purpose of cross examination.

Mr. Clark: My understanding, your Honor——

[fols. 1056-1060] The Court: That might refresh your memory.

Mr. Clark: My humble understanding is that the instrument should be shown to counsel before the witness is shown the document, and I thought we had a right to see it before the witness was asked the question. There has been nothing more common in my practice, and counsel have been permitted to cross examine on voir dire concerning documents which they intended to use to refresh the recollection.

The Court: I haven't any feeling as to the voir dire examination.

Mr. Clark: That is why I desire to ask whether a voir dire examination is necessary.

The Court: I think under the circumstances it will do no harm.

* * * * * * *

[fol. 1061] GRACE YARNELL, recalled as a witness in behalf of the People, having been heretofore duly sworn, testified as follows:

Direct examination.

By Mr. Barnes:

Q. Miss Yarnell, in the year 1932, in the months of September and October, was there a bus line operating and running between Colorado Springs and Manitou?

Mr. Clark: That is objected to upon the ground that it — incompetent and irrelevant.

The Court: Objection overruled. You may answer.

A. Yes, there was.

By Mr. Barnes:

Q. Were there taxicabs in operation f- Manitou to Colorado Springs at that time?

Mr. Clark: Just one moment, the same objection.

The Court: The same ruling, you may answer.

A. Yes, there was.

Mr. Barnes: That is all.

Cross examination.

By Mr. Clark:

Q. But you have no knowledge as to what hours the bus [fol. 1062] line operated during the month of October, 1932?

A. They always ran every 10 minutes.

Q. A bus line from Colorado Springs to Manitou, and the bus ran every 10 minutes?

A. Yes, sir.

Q. And you don't know whether Mr. James used any bus line on any particular day or not?

Mr. Barnes: That is objected to unless the witness saw him.

The Court: Objection sustained. I will change that ruling. You may answer. Have you any knowledge as to whether Mr. James did use the bus on that day or not?

Mr. Barnes: I think, if the Court please, it should be personal knowledge and not hearsay.

Mr. Clark: Well, let me reframe the question.

The Court: All right.

By Mr. Clark:

Q. You don't know of your own knowledge, whether Mr. James did or did not use any bus line going from Colorado Springs to Manitou on the day that Mrs. James met her death, do you?

A. I didn't see him.

Q. You say that taxicabs operated between the two places. By that you mean, I suppose, that a person could hire a taxicab for the purpose of making the trip?

A. Yes.

Q. You didn't mean that taxicabs do make regular trips the same as buses do, did you?

[fol. 1063] A. No.

Mr. Clark: That is all.

Mr. Barnes: That is all, Miss Yarnell.

Mr. Williams: Call Mr. Lynch.

Mr. Clark: I forgot in reference to Mr. Killion there will probably be some matters on voir dire cross examination that we will want to use Mr. Killion on.

The Court: Oh, yes.

Edward F. Lynch, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Edward F. Lynch.

Direct examination.

By Mr. Williams:

Q. What is your occupation, Mr. Lynch?

A. Statement reporter, in the Sheriff's Department, Los Angeles County.

Q. Did you occupy that position on May 2nd, 1936?

A. Yes, sir.

Q. On that date, about 11:45 A. M. in the county jail of Los Angeles County were you present when questions were asked and a statement to the defendant Robert S. James, and his reply thereto?

A. Yes, sir.

[fol. 1064] Q. Did you at that time, take any shorthand notes?

A. I did.

Q. Did you at that time, take shorthand notes of everything that was said in your presence?

A. I did.

Q. Have you those notes with you?

A. Yes, sir.

Q. Did you in addition to making those notes and immediately thereafter transcribe into longhand by typewriter everything which you had taken in your notes?

A. Yes, sir.

Q. Were the notes and the transcription made a true and correct report of what was said in your presence on that day?

A. Yes, sir.

Q. As a matter of convenience will it be better for you to use the transcript rather than the notes?

A. No.

Q. It doesn't make any difference?

A. No, sir.

Q. Turning to your notes and using them for the purpose of refreshing your recollection, will you state at this time who were present and what was said on that occasion?

Mr. Clark: Just one moment. That is objected to upon the ground that it is incompetent and no foundation has been laid for the introduction of such testimony in that apparently it is an attempt to get an accusatory statement, [fol. 1065] accusing Mr. James of the crime for which he

is now on trial, together with his conduct thereto, for the jury, amounting to an implied confession, without any showing that such implied confession is free and voluntary, and without the showing that Mr. James was so situated at the time the proposed testimony relates, and that the circumstances were such that he was free to speak, or not, as he desired.

[fol. 1066] The Court: The objection will be sustained until further objection is made.

By Mr. Williams:

Q. Prior to, and at the time of the taking of the statement, were you in the room, Mr. Lynch, with Mr. James?

A. Mr. James was in the room when I arrived.

Q. Yes. And at the same time that you arrived did other persons arrive?

A. Yes, sir.

Q. Who arrived with you?

A. I believe it was Deputy Sheriffs Gray and Killion.

Q. And when you went into the room, who were in the room?

A. You were in the room, Mr. Southard, Mr. Griffen, and there were some newspaper men and photographers there.

Q. Now, was there any force or violence used upon the defendant at that time?

A. No, sir.

Q. Were there any threats made to him?

A. No, sir.

Q. Or any offer, or any promise or hope extended for immunity or reward?

A. No, sir.

Q. Was the statement he made at that time made freely and voluntarily?

Mr. Clark: Just a moment. That is objected to on the ground it calls for a conclusion of the witness.

[fol. 1067] The Court: Overruled.

A. Yes, sir.

By Mr. Williams:

Q. Now, reading from your notes, will you state what was said by each person present?

Mr. Clark: Now, if your Honor please, we repeat our objection stated a moment ago to a similar question, that

it is incompetent, and that no foundation has been laid therefor, and we desire at this time to examine the witness upon voir dire, and in that connection we offer to show to your Honor, by the cross examination of this witness, supplemented, perhaps, by independent testimony, that the circumstances under which the conversation took place was such that Mr. James was not in the position to speak, or—that he was refrained from speaking as he chose, and that his statements there, and his conduct, were not free or voluntary.

The Court: You may examine the witness on voir dire.

Mr. Clark: Will your Honor indulge me if I stand around and have a little better view of the witness' face?

The Court: You may do so.

By Mr. Clark:

Q. What was the name, sir?

A. Lynch.

Q. Mr. Lynch, the place where this conversation occurred was in the County jail, was it?

A. Yes, sir.

Q. It was your understanding that the defendant was then a prisoner in the jail?

[fol. 1068] A. Yes, sir.

Q. You didn't accompany him from his tank in the jail to the place where the conversation took place, did you?

A. No, sir.

Q. You have no knowledge of what, if anything, was said to him between the two places, have you?

A. No, sir.

Q. When you reached the room to which you have referred, Mr. James, as I understand, was already there?

A. Yes, sir.

Q. You don't know, of course, what conversation had taken place before you came in?

A. No, sir.

Q. You do know that Mr. Southard was one of the people who were present when you entered the room?

A. Yes, sir.

Q. And you know Mr. Southard as being an investigator of the District Attorney's office?

A. Yes, sir.

Q. And you know Mr. Griffen was in the room?

A. Yes, sir.

Q. And you knew Mr. Griffen at that time as an investigator of the District Attorney's office?

A. Yes, sir.

Q. All of these people were seated there in the room when you arrived, were they not?

[fol. 1069] A. I don't know whether they were seated, or not. Some of them were.

Q. Well, out of all that I have mentioned, Mr. Southard and Mr. Griffen, were they standing up, or sitting?

A. I couldn't tell.

Q. You know Mr. S. J. Silverman in this case?

A. Only by sight.

Q. He is out of the courtroom temporarily. Mr. Williams, I believe, the Deputy District Attorney, was there?

A. Yes, sir.

Q. Have you seen any other person there who was known to you to be an attorney besides Mr. Williams?

A. No, sir.

Q. And was the defendant sitting down, or standing up, when you first saw him?

A. Sitting down.

Q. About what time of the day was this?

A. 11:45 A. M.

Q. Do you know the defendant was brought into that room handcuffed, or not?

A. No, sir.

Q. He was not handcuffed when you saw him?

A. No, sir.

Q. He was not handcuffed when you saw him?

A. No, sir.

Q. When he was sitting down, was that near some little [fol. 1070] table or desk?

A. It was near a table.

Q. And were others sitting around that table, also?

A. Yes, sir.

Q. With relation to the place, then, where Mr. James was seated, where was Mr. Southard seated?

A. I believe that Mr. Southard was seated across from Mr. James on my left.

Q. That would be facing Mr. James?

A. I believe so.

Q. With the table between the two, as I understand?

A. Yes, sir.

Q. Now, about how wide was that table?

A. About three and a half feet.

Q. And where was Mr. Griffen, according to your recollection?

A. I believe he was seated across from Mr. James, also, and on my left.

Q. All right. I wonder if Mr. Griffen is in the courtroom?

Mr. Williams: He is not.

Mr. Clark: May I hear that last answer, Mr. Person?

(Record read by the reporter.)

Q. He was about the same distance from Mr. James as Mr. Southard was?

A. As I recall.

[fol. 1071] Q. Both of them were facing Mr. James?

A. Yes, sir.

Q. So that when they looked, they could look right directly at Mr. James' face?

A. I believe so.

Q. Was your attention particularly directed to Mr. James' ears at that time?

A. His ears?

Q. Yes.

A. No, sir.

Q. You didn't notice whether they were or were not then swollen?

A. No, sir.

Q. At the time you entered the room, was any conversation going on?

A. Not that I recall.

Q. Without going into anything that was said—withdraw that. When you went there you carried a stenographer's note book, did you not?

A. Yes, sir.

Q. And pencils?

A. A pen.

Q. A pen?

A. Yes, sir.

Q. That is what you usually use in taking shorthand notes?

[fol. 1072] A. Yes, sir.

Q. You went there for the purpose of taking notes?

A. Yes, sir.

Q. It had been communicated to you by some one that shorthand notes were to be taken?

A. Yes, sir.

Q. About how long before you got to the room did you receive that information?

A. About an hour.

Q. You know Mr. Charles Hope, do you?

A. Yes, sir.

Q. Was he present there on the occasion of which you speak?

A. I don't know whether he was there when we went in, or whether he was brought in afterwards, but he was there at the time of the statement.

Q. At any rate, you remember that he was there at the time that your writing was done?

A. Yes, sir.

Q. I am safe in infer-ing, then, am I not, that after you entered the room some little delay occurred before you did any writing, then?

A. No, sir, not over a few minutes.

Q. Well, there were some few minutes after you got there that you did no writing?

A. Yes, sir, I was getting a chair, and fixing the chair [fol. 1073] and the table there.

Q. There was some talking being done during that time, wasn't there?

A. Well, I couldn't say as to that; I don't know.

Q. Well, do you remember, before you commenced writing do you remember hearing Mr. Silverman's name mentioned by any one?

A. No, sir.

Q. The room that you were in when you did the writing is a room adjacent to the attorney's room in the jail, is it? And is it on the south side of the attorney's room?

A. On the south side of the attorney's room, about 75 feet, I imagine.

Q. There are quite a number of other rooms intervening, are there not?

A. No, there is a long corridor from the attorney's room to this room.

Q. And the room in which the conversation took place is isolated, is it not, off by itself?

A. Yes, sir.

Q. Now, how long would you estimate you were in there before you began taking notes?

A. Not over two or three minutes, if that long.

Q. During that two or three minutes the defendant remained seated?

A. Yes, sir.

[fol. 1074] Q. Did you notice the expression on his face while he was seated there?

A. I looked at him. I didn't particularly notice any expression on his face.

Q. Did he look to you then as he does now, as you see him sitting there?

A. Yes, sir.

Q. And again without going into anything that was said to him, who, if you know, was the first person that spoke to him there?

A. Mr. Williams.

Q. At the time that Mr. Williams began speaking you began writing, I suppose?

A. Yes, sir.

Q. Do you think you could tell everything that Mr. Williams said?

A. Do I think I could tell it?

Q. Do you think you did take down everything that Mr. Williams spoke?

A. Yes, sir.

Q. Was Mr. Williams seated across the table from the defendant as Mr. Southard and Mr. Griffen were?

A. Yes, sir.

Q. Where was Mr. Killion?

A. I believe he was to my left, too, across the table from Mr. James. I believe all the men were on my left, and across the table from Mr. James.

[fol. 1075] Q. Mr. James was on one side of the table entirely by himself, is that right?

A. I believe so, yes sir.

Q. About how long did Mr. James remain in the room after you reached it?

A. I don't know. I left. He was still there when I left.

Q. Do you know how long before that Mr. James had been an inmate of the county jail?

A. No, sir.

Q. Or who the arresting officers were?

A. No, sir.

Q. Was Mr. James left alone in that room with anyone while you were there?

A. No, sir.

Mr. Clark: Will your Honor indulge me a moment?

The Court: Yes.

Mr. Clark: If your Honor please, I have no further voir dire examination, no further questions I want to ask this witness; but I do desire at this time to introduce other evidence of other witnesses relating to occurrences prior to the time that this witness came into the room, and things of which this witness has no knowledge.

The Court: You may do so.

Mr. Clark: Will Mr. Southard take the stand for a few questions?

[fol. 1076] J. C. SOUTHARD, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: J. C. Southard.

Direct examination.

By Mr. Clark:

Q. You are an investigator of the District Attorney's office, are you not?

A. I am.

Q. And you have been such investigator, I take it, at least at all times during the present year?

A. For eight years.

Q. Are you one of the officers who arrested this defendant along this spring?

A. The 19th day of April.

Q. You say you arrested him on the 19th of April?

A. That is right.

Q. Where did you make the arrest, may I inquire?

A. 38——

Mr. Williams: Just a moment, we object to anything that happened on the 19th or prior to the time of taking the statement, on the ground it is too remote, incompetent, irrelevant and immaterial.

The Court: That objection is overruled.

A. 3886 South La Salle.

[fol. 1077] By Mr. Clark:

Q. That is in the City of Los Angeles?

A. That is.

Q. About what time of day was the arrest made?

A. 9:12 A. M.

Q. Did you, on the day of the arrest, take the defendant before any magistrate?

A. I did not.

Q. Did you take him to the city jail?

A. I did. I brought him to the District Attorney's office.

Q. Did you take him to the county jail?

A. Not at that time.

Q. You kept him in custody, that is, your personal custody how long?

A. He was not in my personal custody. Different members of the squad took care of Mr. James.

Q. By your personal custody, I was using you plurally to mean you and your associate investigators.

A. That is right.

Q. You kept him in the custody of yourself and other investigators how long?

A. I believe it was two days; I am not sure.

Q. It is a fact, isn't it, that you took him to the county jail on the 21st of April, a few minutes before 10 o'clock.

A. If the record so states, yes.

[fol. 1078] Q. That is your best recollection now, isn't it?

A. I thought I booked him on the morning of the 22nd; I am not sure.

Q. Where did you keep him on the night following his arrest?

A. I brought him back to the District Attorney's office and then returned to the house that we had next door to 3886 La Salle, the address of which is 3882.

Q. Now, let me see if I have got the sequence of events straight in my mind. When you arrested him the first thing you did was to take him to the District Attorney's office?

A. No, the first thing we did was to take him over and show him the dictaphone we had set up in the house next door, that is our receiving set.

Q. Well, after that, the first place you took him was to the District Attorney's office, is that right?

A. After leaving the La Salle street address, yes.

Q. And he remained——

The Court: May I ask the witness one question? I am not sure that we are not going into the subject matter that is irrelevant here. On what charge was the defendant placed under arrest?

A. Incest.

Mr. Clark: Just one moment, I object to that, your Honor, on the ground that it is incompetent, irrelevant and immaterial.

[fol. 1079] The Court: I think it is quite material. For example, suppose we were trying a case of robbery and a man has been arrested on a robbery charge we will say on the 1st of May, 1936, and then on the 1st of March, 1936 he had been arrested on an entirely different charge. I can so no relevancy between his arrest on the 1st of March and his arrest on the charge now pending.

Mr. Clark: Your Honor, I hope I do not receive your Honor's displeasure, but whenever the law arrests a man and holds him at night in this city where there are night Courts, sitting 24 hours a day, seven days a week, I think that is a circumstance to be considered with reference to the freedom of the actions of a defendant at all times thereafter. I made certain suggestions to your Honor in chambers this morning. Apparently a misunderstanding between the Court and myself exists, but I think that I ought to make, your Honor, an offer of proof which should not be made in the presence of the jury.

The Court: Well, I am satisfied that although night courts and other courts are supposed to be in session certain hours and night courts presumably 24 hours a day, I know, as a matter of fact, that that is not true and that after certain hours at night that no court is in session.

[fol. 1080] Mr. Clark: I think, your Honor, in making—I think that your Honor is making a mistake. I know in a case which I have tried heretofore that the statement made was erroneous, and your Honor will realize that I had ample grounds for making the statement that I did.

The Court: I am satisfied.

Mr. Clark: Technically, under the law, I think the courts are in session all the year. The Court is really in session during the entire year.

The Court: Well, any court is supposed to be in session a certain length of time, but generally it ceases to hold any session about 1:00 o'clock.

Mr. Clark: There are a few matters that have occurred to me, and I suggest your Honor take the morning recess, and then when the Court resumes the session, that we have the session outside of the presence of the jury.

The Court: Suppose we take our recess of the jury at this time, take a short recess.

(Jury retires.)

Mr. Silverman: Your Honor, may we have Mr. James taken to the hospital?

The Court: No, the Court is still in session.

Mr. Clark: May I proceed?

The Court: No, I think I have your basic idea. In other words, it might be possible from prior experience that upon an individual being arrested for an offense by the same [fol. 1081] person, there might be matters which would be most material to the admissibility of the confession as to the latter offense, but I thought before we went into the matter there should be some indication on the relationship between the arrest on the incest charge and the murder charge, to show that the statement made on the murder charge might have been influenced by the transaction at the time of the arrest on the incest charge. Were you through?

Mr. Clark: Yes, your Honor.

The Court: I would like to add to what I said in regard to the so-called night court. Instances when Courts have been actually in session 24 hours is something I have never heard of. The Judge on duty during the night session, when an investigation was made, the investigation during the 22nd of June, found that those Judges were not available at that time, after 1:00 o'clock in the morning, and that on certain hours of Sunday that they were not available.

Mr. Clark: If your Honor please, before the case is closed, the statement that I made before——

The Court: I am satisfied in the judgment, and the statement was made in good faith, but you don't know.

Mr. Clark: I am positive of the testimony to that effect. In reference to what your Honor has suggested, I think I might say that we do expect to show in several ways the matters to which your Honor speaks. We expect to show, amongst other things, that the defendant was in the cus- [fol. 1082] tody of these officers, and that he was being investigated not only of murder, but incest, and that the investigation of the incest charge arose out of the investiga-

tion of murder, and according to my understanding, and I have had experience, the difference between the two investigations is not sharply drawn by the investigation at all. [fol. 1083] However that may be, we expect to show that physical violence was used upon this defendant by the investigators while he was in their custody, and that the violence used was so severe as to cause a very high degree of physical suffering, and that when he was brought into the presence of those officers upon that occasion, he feared the repetition of the use of that force and felt forced by reason of that fear to do, as he understood, was expected of him.

I am making this statement, although it probably is not necessary, because I only intended to make a statement to one point, and I may say to your Honor that we expect further to show that shortly before this conversation took place, that Mr. Silverman, who was then representing the defendant and was his attorney, told the defendant that he was going to be indicted for this murder and told the defendant not to make any statement to the District Attorney's office. That is part of the general showing that we expect to make for the purpose of showing that he was not prepared to make any statement in regard to that.

I hope that the proof that I have will go beyond the statement I have made but for a number of reasons I do not want to disclose all we expect to show.

The Court: Well, we will take a few minutes recess.

(Recess.)

The Court: Was that statement marked as an exhibit?

Mr. Clark: I think not.

[fol. 1084] Mr. Williams: No, it was not marked. Does your Honor want to look at it?

The Court: I would like to look at it.

(After Recess.)

The Court: I think we completed our matters outside of the presence of the jury.

(Jury returns into the courtroom.)

The Court: You may proceed.

Mr. Clark: If your Honor please, I have a medical man here, in the nature of whose testimony would probably not be admissible on the foundation that I will undertake to

lay, therefor, but I will attempt to withdraw Mr. Southard and put the doctor on now if I may.

The Court: I understand that there is no objection to that?

Mr. Williams: No objection, only that if the foundation is not laid——

The Court: The jury will understand that this testimony is taken out of order and whether it remains in the record depends on what may appear later in the testimony. However, we will put the doctor on now.

Mr. Clark: Dr. James DeWitt George.

[fol. 1085] Dr. James De Witt George, called as a witness in behalf of the Defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: James DeWitt George.

Direct examination.

By Mr. Clark:

Q. Doctor, I understand that you are a physician and surgeon regularly licensed to practice medicine under the laws of the State of California now engaged in the practice of your profession in the City of Los Angeles, is that correct?

A. Yes.

The Court: Just keep your voice up, Doctor.

A. Yes.

By Mr. Clark:

Q. And about how long have you been engaged in such practice?

A. Seven years.

Q. And is that a general practice or do you specialize?

A. Specialize.

Q. What is your specialty?

A. Obstetrics and gynecology.

Q. Now, I will ask you if you knew the defendant, Robert S. James?

A. Yes.

Q. Did you, at my request, make an examination of his [fol. 1086] person during this morning?

A. Yes.

Q. Will you tell us what that examination disclosed?

A. Mr. James has a right inguinal hernia.

Q. Will you just explain what an inguinal hernia is so that the jury will understand?

A. A hernia is a rupture, a breaking of the abdominal wall permitting the contents to protrude.

Q. Have you ever had occasion to make any abdominal examination of Mr. James before this?

A. Sometime in November he came in my office requesting a physical examination.

Q. Was he stripped then?

A. Partially, just to the waist.

Q. Up from the waist?

A. Yes.

Q. That is exposed the entire abdomen?

A. Yes.

Q. Did you see any hernia then?

A. I remember of no hernia at that time.

Q. Did he complain of any?

A. There was no complaint of hernia, no.

Mr. Clark: Cross examine.

[fol. 1087] Cross-examination.

By Mr. Williams:

Q. Did you make an examination at that time to determine whether he had a hernia?

A. Yes, I originally examined the rings, and while I didn't examine as carefully as I examined at the present time I found no evidence of hernia.

[fol. 1088] Q. Now, with reference to this hernia that you discovered today, can you state how long that hernia has been in existence?

A. I have no idea, no. There is no way of telling.

Mr. Williams: That is all.

Mr. Clark: That is all. I understand that we will want the Doctor for about an equal time hereafter, but we will arrange that over the telephone with the Doctor, and try

to inconvenience him as little as we may. I will proceed with Mr. Southard.

J. C. Southard, resumes stand.

Direct examination (Continued):

By Mr. Clark:

Q. Mr. Southard, when did you begin investigating the death of Mrs. James?

A. March 22nd, I believe.

Q. And you continued your investigation of her death down to the time this trial commenced, did you not?

A. I did.

Q. At the time that Mr. James was taken into custody by you and your associates, you were investigating both this charge and another one, were you not?

A. Well, in one way, and in another way, no. It is rather a hard question to answer, Mr. Clark.

Q. Well, you informed him at the time that he was first [fol. 1089] in the District Attorney's office, didn't you, that you were investigating the death of his wife?

A. Not that I recall, at that time. I arrested him on the other charge first. However, I ran into that charge while I was working on the murder angle.

Mr. Clark: May I have that answer, Mr. Person, please?

(Answer read by the reporter.)

Q. Now, you say you arrested him on the other charge. You didn't mean by that that you had any warrant for his arrest upon any other charge?

Mr. Barnes: That is objected to as immaterial.

The Court: Overruled.

A. No, but it was a felony committed in my presence——

By Mr. Clark:

Q. What you mean was the cause or the occasion of the arrest, is that correct?

A. Correct.

Q. Now, during the time that he was in custody, you continued your investigation of the murder charge, did you?

A. I did.

Q. And during that time, also, you also used some physical force upon him?

A. I did not. That was in the other case.

Q. You say that was in the other case. You mean that some physical force was used upon him while he was in your custody, and you attributed the physical force to the other case, is that right?

[fol. 1090] A. I slapped his face in the other case.

Q. Slapping his face is the only thing you did to him?

A. That is right.

Q. What day did you slap his face?

A. I think it was on a Monday morning, the 20th of April.

Q. That would be the day before he was delivered to the County jail?

A. Yes.

Q. Did you present him in the County jail, when he was taken there?

A. I did.

Q. Did you notice any marks or bruises upon his face or head when he was taken into custody?

A. Not that I recall.

Q. Well, you did notice marks and bruises upon his head when you took him to the County jail, didn't you?

A. No, I don't believe so.

Q. Weren't both of his ears bruised and swollen at that time?

A. They were not.

Q. Neither one of them?

A. That I wouldn't say; one may have been. I wouldn't be positive. I know that both were not.

Q. As a matter of fact, you know that one was, don't you?

A. I do not. I saw that one in court.

[fol. 1091] Q. You saw the bruises here when he was in court?

A. The left ear was a little bit swollen at the top.

Q. And he wasn't in court until how many days after you took him to the County jail?

A. As a matter of fact, it was not at the Court. It was at the Grand Jury, when they indicted him for the other charge.

Q. And that was on the 6th of May, was it not?

A. No, that is when he was indicted for the murder charge, but the other charge was before that, Mr. Clark.

Q. He was before the Grand Jury twice?

A. That was in April, I believe.

Q. Now, on the first occasion that you took him to the District Attorney's office, what part of the office did you take him into?

A. Mr. Fitts' office.

Q. Was Mr. Fitts there?

A. He was.

Q. Who else was there?

A. Deputy District Attorney Eugene Williams, Officer Scott Littleton, and Officer Dean, and his niece, Lois Wright.

Q. That was on the same day that he was arrested, as I understand it?

A. That is right.

Q. About how long did he remain there in Mr. Fitts' room?

[fol. 1092] A. Oh, I would say about approximately an hour.

Q. Didn't you take him to one of the rooms in the investigating bureau before you took him to Mr. Fitts' office, Mr. Southard?

A. I did not. Lieutenant Morgan of the Los Angeles Police Department did.

Q. How long was he there in the investigating bureau before he was taken into Mr. Fitts' office?

A. I couldn't tell you, because I wasn't back there with him. I was in Mr. Fitts' office.

Q. About how long was it after you took him into the suite before you saw him in Mr. Fitts' office?

A. Possibly an hour.

Q. Before you took him to Mr. Fitts' office, did he say anything to you about wanting a lawyer?

A. He did not.

Q. Did you hear him say anything to any one about wanting a lawyer before that?

A. At no time.

Q. You never did hear him say anything about wanting a lawyer?

A. I never did.

Q. Didn't you tell him there in Mr. Fitts' office that you had tried to telephone his lawyer, Mr. Silverman, and were unable to reach him?

A. I did not.

[fol. 1093] Q. Did you ever tell him that, at any time?

A. I did not.

Q. Did any discussion ever take place between you and Mr. James, or in your presence, in which Mr. James' attorney was mentioned?

A. No—the discussion was in my presence. I believe he asked Mr. Fitts to get in touch with Mr. Silverman, and Mr. Fitts offered to get in touch with him, and was unable to locate him, but as far as I personally, I didn't have anything to do with it.

Q. That was upon the first time that he was in the District Attorney's office?

A. That is right.

Q. Did you hear Mr. James frequently after that then express a desire to be represented by counsel when he was in the District Attorney's office?

A. I did not.

Q. Or when he was with investigators?

A. I didn't pay much attention to Mr. James. I was working on the other angle of the case, entirely.

Q. Now, during the hour that Mr. James was in Mr. Fitts' office, did any one ask him if he wanted to have a lawyer present?

A. That I could not state.

Q. Was any stenographer present during that time?

A. I believe there was.

[fol 1094] Q. And the stenographer was taking down what was being said, as nearly as you could tell?

A. As I recall, yes.

Q. Do you know who the stenographer was?

A. We have had so many, Mr. Clark, I wouldn't say whether it was Bob Herron, or Mrs. Dorothy Adams of our office.

Q. When Mr. James was taken into the District Attorney's office, and by that I mean into the suite, was he handcuffed?

A. He was not.

Q. And of course he wasn't handcuffed when he was taken into Mr. Fitts' room?

A. He was not.

Q. During the period which you estimate to be about an hour, while he was in the room, questions were being asked him, were they not?

A. Which room are you referring to now, Mr. Clark?

Q. Mr. Fitts' room.

A. Yes.

Q. I understand that in the other room you weren't present, and wouldn't know?

A. Yes.

Q. And he was being questioned by more than one person, wasn't he?

A. No, I think Mr. Fitts did all the questioning at that time.

[fol. 1095] Q. He was told that Mr. Fitts was the District Attorney wasn't he?

A. He was.

Q. And he was told that he was accused of a felony, wasn't he?

A. He was told that Lois Wright had made a complete confession of the whole thing.

Q. And during the time that he was in there some statements were made to him concerning the death of his wife, were they not?

A. Not at that time, I don't believe, Mr. Clark.

Q. Wasn't he at that time told by Mr. Fitts that you were investigating the death of his wife?

A. I believe not.

Q. Wasn't he told at that time that it was the intention of the District Attorney's office, if he didn't make a complete statement, to charge him with the death of his wife?

A. No, sir, at no time.

Q. When he was there in the District Attorney's office he was told that a statement was wanted from him, wasn't he?

A. Mr. Fitts showed him the statement of Lois Wright, and asked him if he recognized her signature, and as I recall it, he said he did.

Q. That was as soon as he was brought in there, is that correct?

A. Lois Wright was taken in first——

[fol. 1096] Mr. Clark: Pardon me. That is not answering the question. Read the question.

(Question read by the reporter.)

A. No, that is not correct.

Q. Well, something was said to him as soon as he was brought in, wasn't there?

A. Into Mr. Fitts' office, or into the building?

Q. Into Mr. Fitts' office.

A. When he first came to Mr. Fitts' office, that is what I was relating.

Q. We didn't understand each other. The first thing after he came into Mr. Fitts' office, Mr. Fitts told him that Lois Wright had made a statement, and asked him if he recognized her signature, is that right?

A. That is right. Mr. Fitts showed him her statement.

Q. The statement that Mr. Fitts showed him was typed, of course?

A. It was.

Q. And you weren't present when the typing was done?

A. No, sir.

Q. Did Mr. Fitts say to him, in substance, that he had better clear the whole thing up and save a lot of expense?

A. No, sir, not at that time. That was in this case here.

Q. At any rate, he was told up there on the first occasion that a charge of murdering his wife was then under inves-
[fol. 1097] tigation, wasn't he?

A. I believe not.

Mr. Clark: It is a little near the hour of adjournment.

The Court: Well, we have a few minutes yet.

By Mr. Clark:

Q. Now, how long after that was it—by the way, he didn't sign any statement on this first visit to the District Attorney's office, did he?

A. Not to my knowledge.

[fol. 1098] Q. He said something then about not wanting to talk, didn't he?

A. Well, as I recall, he refused to talk to Mr. Fitts.

Q. When you say "He refused to talk", instead of saying he didn't want to talk, he said that he refused to talk, is that it?

A. No, that isn't what he said.

Q. How long was it after this first occasion before he was back in the District Attorney's office?

A. You mean back there for questioning again?

Q. Yes.

A. Let's see; I arrested Charlie Hope on the 1st, and I believe that was on the 2nd of May in the District Attorney's office in the custody of Killion and Gray of the Sheriff's office.

Q. On the 2nd of May?

A. Yes sir, that is right.

Q. On this occasion in Mr. Fitts' room, he told Mr. Fitts that he didn't want to talk almost as soon as he got into the room, didn't he?

A. He told Mr. Fitts to go to hell, if you want to hear the plain words.

Q. He said that right away?

A. After Mr. Fitts asked him a few questions.

Q. You would say after the first half dozen questions?

A. After he was shown this document and Mr. Fitts asked [fol. 1099] him about it.

Q. He hadn't been in the room for five minutes at that time, had he?

A. No, I don't believe he had.

Q. And then he said he didn't want to answer any questions, and for Mr. Fitts to go to hell, and they kept right on questioning him?

A. Yes, sir.

Q. Mr. Williams took part in that questioning as well as Mr. Fitts?

A. I wouldn't be sure about that.

Q. You took some part in it?

A. Not that I recall.

Q. Quite a few questions were asked when he didn't say anything at all?

A. They asked him about his trip from Alabama out here and all about it and he made no answer at all.

Q. And when questions were asked that he didn't answer, why they simply went on asking questions, didn't they?

A. Let me get that question straight.

The Court: You spoke inadvertently, Mr. Clark.

Mr. Clark: What is that?

The Court: You spoke inadvertently.

Mr. Clark: Perhaps. Let me withdraw the question and save time by asking another.

Q. When any question was asked him, that he didn't answer, somebody shot another question at him, didn't they?

[fol. 1100] A. Mr. Fitts continued on asking him questions as I recall.

* * * * * * *

[fol. 1101] J. C. SOUTHARD resumed the stand and testified as follows:

Direct examination (continued).

Mr. *Mr.* Clark: May I proceed now, your Honor?
The Court: Yes, you may proceed.

By Mr. Clark:

Q. Now, Mr. Southard, when you arrested the defendant, why didn't you take him before a magistrate?

Mr. Williams: That is objected to as immaterial, if your Honor please.
The Court: Objection sustained.

By Mr. Clark:

Q. The reason you didn't take him before a magistrate at once was because you wanted to get a confession from him, wasn't it?

Mr. Williams: The same objection.
The Court: Objection sustained.

By Mr. Clark:

Q. As I understand, after this interview in the District Attorney's office, you took Mr. James down to a house adjacent to the one he had been living in, is that right?
A. That is right.
Q. At that time the county jail was located in this same [fol. 1102] building as it is now?
A. Yes, it is in the same building.
Q. You did not at any time that day or the day of this arrest or the next day, take him to the county jail, did you?
A. I couldn't quite catch that question.

(Question read by the reporter.)

A. Not that day or the next. As I recall it was the following morning.

Q. During the time following his arrest and before he was taken to the jail, various investigators from the District Attorney's office talked to him, isn't that true?

A. I believe that is right.

Q. And Mr. Griffen was one of them, wasn't he?

A. Yes, I believe he did talk to him.

Q. Talked to him out there at the house where you were keeping Mr. James?

A. That is right.

Q. Mr. James wasn't left alone a minute during any of that time?

A. I couldn't state. I wasn't with him all of that time.

Q. Didn't you give instructions that he should not be left alone?

A. In what way, left alone, Mr. Clark?

Q. Left without some person being in his immediate presence?

A. I had him under arrest. I had someone with him all [fol. 1103] the time, surely.

Q. And all the time that you were there somebody was talking to him, weren't they?

A. Yes.

Q. He was being asked questions all the time, wasn't he?

A. That is right.

Q. A great many of the questions he didn't answer, did he?

A. Some he would and some he would not.

Q. Sometimes he would just droop his head and sit there in silence, wouldn't he?

A. No, he wouldn't droop his head. He would just sit there and look at you blankly.

Q. And when he sat there and looked at you the questions proceeded all the more vigorously, didn't they?

A. No, just the same line of questions.

Q. Just the same line of questions, but they came a little faster, did they not?

A. No, they did not.

Q. He wasn't taken out for meals during that time, was he?

A. I beg your pardon.

Q. Was he?

A. Yes.

Q. How many times was he taken out to meals?

A. Every time it came meal time.

[fol. 1104] Q. How many meals did he have?

A. He had three meals a day and if he wished at night why, he had something else to eat.

Q. He was pretty well worn out when he got to jail, wasn't he?

A. I couldn't tell you.

Q. He looked like it, didn't he?

A. He looked about the same as he does now, only he hadn't shaved.

Q. And now, after he was put in jail, how long was it until you saw him again?

A. I believe the next time I saw Mr. James was on the morning of the 2nd of May when the statement was taken from him in the Chaplain's room of the county jail.

Q. Where did you first see him then?

A. When Deputy Sheriff Killion brought him into the room.

Q. Were you yourself in the room before Mr. James came in?

A. I don't believe I was.

Q. You met Mr. James on the way in, didn't you?

A. I couldn't say. I had Charles Hope handcuffed and I couldn't say whether I met him on the way or not.

Q. Are you sure no words were passed from you to James while he was being taken in there?

A. Positive.

Q. How long was it after he was in the room, if at all, [fol. 1105] before the stenographer was sent for?

A. I couldn't tell you.

Q. Well, there was some conversation with Mr. James in the room before the stenographer was sent for, wasn't there?

A. There wasn't a word spoken until the stenographer was present and Mr. Hope was in the room.

Q. Was there any conversation that occurred before the stenographer began writing?

A. There was not.

Q. Now, the next few questions, your Honor, that I am now going to ask, would not be voir dire to this particular transaction. I will ask one of them, and if counsel objects, or your Honor thinks it is improper, I will not go any further. Now, after this conversation in the Chaplain's office there, you had some further conversations with Mr. James the same day, didn't you?

A. Not that I recall.

Q. Did you see him in the District Attorney's office that same day?

A. Well, if the defendant should confess, yes. That was at night.

Q. What time did you see him at night?

A. I saw him at—I saw him with Killion in the afternoon at the James home at 1329 La Canada Road.

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[fol. 1106] Mr. Clark: Well, at any rate, either on the same day that you saw him in the Chaplain's room, or on the next day, you saw him in the District Attorney's office, is that right?

A. Yes, in the evening, I believe it was.

Q. Did you arrange to have him taken to the District Attorney's office?

A. I did not.

Q. You don't know how he came to be there?

A. I do not.

Q. You say it was in the evening; about what time of the evening did you see him?

[fol. 1107] A. Oh, I would say it was along about possibly 5:00 or 6:00 o'clock.

Q. And in what part of the office did you see him on that occasion?

A. I believe it was in Mr. Stewart's room.

Q. Did you see him any place in the suite, or corridors, before you saw him in Mr. Stewart's room?

A. Not that I recall.

Q. Do you know who took him to Mr. Stewart's room?

A. I don't know for sure, but at the time I saw him he was in the custody of Deputy Sheriffs Killion and Gray.

Q. And was he handcuffed?

A. I wouldn't be positive as to that.

Q. About how long were you in Mr. Stewart's room at that same time he was?

The Court: I don't think the witness said he was in Mr. Stewart's room. He said he saw him in the room.

Mr. Clark: I beg your pardon.

Q. Were you in Mr. Stewart's room with him?

A. With other people, yes.

Q. When you entered Mr. Stewart's room, who else do you remember being there?

A. Mr. Stewart and Mr. Fitts, Deputy District Attorney Eugene Williams, I believe was there, and Deputy Sheriffs Killion and Gray. I believe that is about all at that time.

Q. Mr. Silverman wasn't there?

[fol. 1108] A. He was not.

Q. Nor any lawyer other than the Deputy District Attorneys that you mentioned, and the District Attorney?

A. Not that I recall.

Q. And did you enter the room before Mr. James, or at the same time, or after him?

A. Mr. James was in the room.

Q. He was already in the room when you came in?

A. He was.

Q. All of these other parties were already there, were they?

A. They were.

Q. Now, he was asked quite a few questions there, wasn't he?

A. Yes, he was.

Q. All of you participated in the questioning, did you not?

A. Yes, I believe everybody talked to him.

Q. Altogether questions were asked him for an hour or two, were they not?

A. I beg your pardon?

Q. I say altogether he was questioned there for an hour or two, wasn't he?

A. I couldn't say as to the length of time; it was quite a while.

Q. Did you take him back to the County jail?

[fol. 1109] A. No, sir, I have never handled Mr. James from the time that I booked him.

Q. By the way, do you know Miss Dorothy Adams?

A. Miss Dorothy Adams?

Q. Yes.

A. Yes, very well.

Q. She was in there part of the time, in Mr. Stewart's room, wasn't she?

A. Not that I recall.

Q. Was there a shorthand reporter, or stenographer?

A. I don't believe there was.

Q. Now, Mr. James was told that you had the goods on him and he might as well come through, wasn't he?

A. It could have been possible.

Q. You heard it stated, didn't you, when you were holding Mr. James out at the house that you had to get a confession out of him?

Mr. Barnes: Objected to on the ground it is hearsay.

The Court: Objection sustained.

Mr. Clark: I meant heard it stated in Mr. James' presence.

The Court: I think it is still objectionable on the ground that there is no identification of who made the statement. It might have been the street cleaner, as far as we know.

Mr. Clark: Very well. You heard Mr. Griffen, the inves-
[fol. 1110] tigator for the District Attorney's office, say something to that effect, didn't you?

Mr. Williams: That is objected to, if your Honor please, as hearsay.

The Court: Overruled.

A. At no time, no, sir.

Mr. Clark: That is all I have from Mr. Southard.

Cross-examination.

By Mr. Williams:

Q. Mr. Southard, just state what conversation occurred between you and the defendant immediately prior to the time when you slapped him in the face.

Mr. Clark: That is objected to upon the ground that it is incompetent, and an attempt to do by indirection just what we have objected to being done directly. However, I appreciate what counsel is trying to get at, and if counsel will frame this particular question in a leading form, I will not object to it as being leading, and then we can see whether it is subject to other objection, or not.

The Court: I didn't get the phraseology of part of the question. May I have it again?

(Question read by the reporter.)

[fol. 1111] The Court: Well, that might be admissible, and it might possibly be objectionable as calling for a conversation. However, the incident having been referred to, the significance of the incident depends, of course, upon the

confession and the balance of the transaction would be admissible.

Mr. Clark: As far as that is concerned——

Mr. Williams: That is not the point upon which we are asking a question.

Mr. Clark: I do not contend that, but I do not believe that a prisoner gives an officer the right to strike him.

The Court: Well, Mr. Clark, the transaction may be such, weighing it as to whether the slapping occurred, the slapping is not any evidence of showing the manner and attitude of what he said. And the law shows that you cannot slap a person unless some violent injury is done, but we know that independent of the law, there are things that occur that are the result of a normal reaction of an individual.

Mr. Clark: There is something in connection with that reaction which I would like to say. However, I don't think that I could say it in the presence of the jury.

The Court: Well, I have reference to the fellow who says, "Now, see that smile".

Mr. Clark: May I point out that the duty of the officer is to take the prisoner before the presiding magistrate? This defendant could not make any use of any language if [fol. 1112] the questions are made in that way. If I am going too far on these matters——

The Court: Well, I don't see how the Court could possibly permit you in the conclusion that the incident of slapping were to have any question of admissibility in the court having the balance of the conversation. Part of the transaction may mean something.

Mr. Clark: I call your Honor's attention to the fact that although the rule is to contrary in this state, that in the majority of the jurisdictions, the law is that when a defendant is in the custody of the officers, that that is inadmissible by reason of that one fact. While that isn't the law here, sometimes in California there is a clear recognition and in some cases it is a strong circumstance tending to show lack of volition.

The Court: We are a little way apart on that. The Court's ruling, that the transaction as to the slapping is to remain a part of the same record——

Mr. Clark: I don't think it is, though.

The Court: Only Mr. Williams' direct question might be objectionable,——

Mr. Clark: I think your Honor is right. Having your Honor's reasoning in mind, that the question should be put in a leading form, I think that the objection would be doubtful if absolutely put.

The Court: I think you had better reframe the question, [fol. 1113] Mr. Williams.

By Mr. Williams:

Q. I will ask you what happened immediately prior to slapping the defendant?

A. I had a conversation with Mr. James.

Q. What was the conversation?

Mr. Clark: The same objection.

The Court: Overruled.

A. I told Mr. James, "It is a dirty shame, such a beautiful little girl and so well brought up and so well thought of by everyone, had to die in a fish pond, be drowned and then put there."

And then James said, "Aw, leave me alone and quit questioning me about her. She wasn't so much before I married her; she was only a little whore when I married her." and I lost my temper and slapped him.

[fol. 1114] Mr. Clark; Just a moment, if your Honor please; I move that that answer be stricken out. I want to get—I beg your pardon.

The Court: I don't hear you.

Mr. Clark: I was going to move to strike that answer and then I was going to get the transcript before I made any motion.

The Court: You may proceed.

By Mr. Williams:

Q. With the exception of that one time, did you strike Mr. James?

A. I never laid a hand on him.

Q. Did any other person in your presence strike him or use any force or violence against him?

A. Not to my knowledge.

Q. That was in April?

A. No, sir.

Q. Or use any force?

A. No, sir.

Q. Now, recalling the time that you struck him, was he further interrogated by you?

A. Yes, sir.

Q. And was he questioned by other persons in your presence?

A. Yes, he was.

Mr. Clark: That is objected to.

The Court: Was there an answer?

A. Yes, he was.

[fols. 1115-1116] The Court: Objection overruled,—or rather objection sustained.

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[fol. 1117] Mr. Clark: The witness is so obviously hostile that I think my examination is cross-examination and counsel's examination is redirect examination.

Mr. Williams: I move——

Mr. Clark: I don't——

The Court: There is nothing in the record at the present time to show that the witness is hostile. It is true he is produced by the District Attorney, and works for the District Attorney, but there is nothing to show that he is hostile.

[fol. 1118] Mr. Clark: If there is no hostility when an officer having a man in custody strikes him, I don't know what would be.

The Court: I think an officer may very well have a man in custody, and still be anything but hostile.

Mr. Clark: Yes, he can, but when he strikes him that is a manifestation——

The Court: We don't want to argue that matter. We all have our own opinion of what we would do under circumstances such as related by the witness. Whether that is subject to criticism is something to argue to the jury at a later time.

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[fol. 1119] By Mr. Williams:

Q. Did the defendant, after the time you slapped him in the face, and when you had him in custody, in the month of April, say anything with reference to whether he had, or had not, killed or attacked or injured his wife, Mary?

Mr. Clark: That is objected to upon the ground that it [fol. 1120] is incompetent and irrelevant to the subject now under inquiry.

The Court: Objection overruled; you may answer.

A. No, sir.

By Mr. Williams:

Q. Now, Mr. Clark asked you a number of questions as to which he didn't fix any specific day, about you having the defendant in custody, and what happened during that time, and I want to ask you now whether, except in those cases in which you specifically stated, or the questions specifically stated that it was the 2nd of May, were your answers all directed to the time that you had him in custody on the 19th, 20th and 21st days of April of this year?

A. To the April occasions.

Q. Now, Captain Southard, on the 2nd of May when you first saw James up in the County jail, in whose company were you?

A. I had Charles Hope handcuffed to me.

Q. Was anybody else with you?

A. Yes, Officer Scott Littleton.

Q. And when you first saw James, in whose company was he?

A. Deputy Sheriff Killion.

Q. And did you speak to him, or did anybody else in your presence speak to him, prior to the time that Mr. Lynch, the statement reporter, entered the Chaplain's office, where the statement was taken?

A. No, sir.

[fol. 1121] Q. During that time, so far as you saw the defendant, was there any force or violence used upon him?

A. There was none.

Q. Any threats made toward him?

A. There were not.

Q. Were there any offers or promises of immunity or reward, or hopes of reward extended to him?

A. There were none.

Q. Were the statements made by him at that time made freely and voluntarily?

A. It was.

Mr. Williams: That is all.

Redirect examination.

By Mr. Clark:

Q. By the way, where did you get the title "Captain"?

Mr. Barnes: I can't hear your question?

The Court: I can't hear it.

Mr. Clark: I asked him where he got the title "Captain".

Mr. Barnes: I submit it is not material.

The Court: I couldn't hear the question yet?

Mr. Clark: I asked him where he got the title "Captain". Counsel very carefully referred to him as "Captain Southard". I assume it was done for a purpose.

The Court: You might ask Mr. Williams. He is the one who asked it.

[fol. 1122] Mr. Clark: I assume he inherited it.

Mr. Williams: No, that is not true. He is a Captain of Detectives, officially designated as Captain of Detectives in the District Attorney's office of Los Angeles. I didn't give him the title. He earned the title by doing good work.

Mr. Clark: May I ask to have Mr. Williams sworn, your Honor.

The Court: You may put him on the witness stand later, if you wish. Any further examination of this witness?

Mr. Clark: Oh, there is one thing further:

Q. Now, you spoke about taking Mr. James from the house where he was living to the house adjoining where he was living, where you had some Dictagraph.

A. Where we had the receiving set of the Dictagraph.

Q. Who was with you at that time?

A. There was quite a crowd. There was a number of newspaper men. Mr. Fitts was there, and Deputy District Attorney Eugene Williams, Scott Littleton, Everett Davis, I believe was there, and Harry Dean.

Q. Do you mean that all those people were there at the time the arrest was made?

A. Well, I had quite a crowd out there to make the arrest, yes, sir; it was quite a large house to cover.

Q. When he was taken over there, and shown that house, didn't you say to him, "Well, now, you see these Dictagraphs. You see we have got the goods on you. You might [fol. 1123] as well admit you murdered your wife."?

A. I did not.

Q. Did any one, in your presence?
A. No, sir, they did not.
Q. So far as you know, that was not said at all?
A. That was never said at any time.
Q. You are sure of that?
A. Not in my presence, anyway.

Mr. Clark: That is all.
Mr. Williams: That is all, Captain.
Mr. Clark: I will have to call Mr. Silverman, I regret, for some questions.

Samuel J. Silverman, called as a witness in behalf of the Defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please.
A. Samuel J. Silverman.

Direct examination.

By Mr. Clark:

Q. Mr. Silverman, you are the attorney for Mr. James, the defendant in this case?
A. I am one of the attorneys.
Q. Well, you have been his regular attorney in civil business for some years last past?
A. For some years, yes.
[fol. 1124] Q. And have been representing him, either by yourself, or in conjunction with others, in all of his legal matters for several years?
A. That is right.
Q. Now, I will ask you whether or not—it is in evidence here, I believe, that he was delivered to the County jail here about the 21st of last April. Did you see him on or about that date?
A. Not on that date.
Q. About how soon after that did you see him?
A. Possibly four or five days after that.
Q. That would be along about the 25th of April?
A. Right.
Q. Did you have any occasion to note his physical appearance and condition at that time?
A. I did, for several days after that.
Q. What did you note in regard to it?

A. Both of his ears were blue and swollen.

Q. Now, referring to a period approximately a week later than that, did you give him any instructions in regard to what course he should pursue if he were interrogated by any officers with relation to the circumstances attending the death of his wife?

Mr. Williams: That is objected to as calling for hearsay.
The Court: Overruled.

A. Yes.

[fol. 1125] Mr. Clark: What instructions did you give him?

A. Information came to me that——

The Court: No, answer the question.

Mr. Clark: Just tell what you said to him.

A. I called on him in the attorney's room of the Los Angeles County jail, and told him upon being questioned by anybody, any official or otherwise, with reference to a murder charge, not to answer any questions unless it was in my presence.

Mr. Clark: You may cross examine.

Cross-examination.

By Mr. Williams:

Q. Mr. Silverman, as a matter of fact you saw Mr. James in the Grand Jury room, in the outer room of the Grand Jury, where the witnesses sit, on the 22nd day of April, didn't you?

A. I don't think, Mr. Williams, that I ever saw him near the Grand Jury room. Wait a minute——

Q. Would you say he appeared before the Grand Jury——

A. Wait a minute. No, I saw him in one of the investigating rooms, I think, one of the offices of the District Attorney's office, was the first time I saw him after his arrest.

Q. That was on the 22nd of April, wasn't it?

A. I don't recall just what date that was.

[fol. 1126] Q. I was mistaken. It was the 21st of April, was it not, Tuesday, the 21st of April, 1936?

A. Now, let's see. I think the arrest happened—he was taken into custody on a Saturday. Am I right?

Q. On a Sunday.

A. Wasn't it Saturday night?

The Court: It has been testified it was the 19th. That was on Sunday.

Mr. Williams: Sunday morning.

A. That was on what charge? The morals charge?

Q. Yes.

A. Well, I didn't see Mr. James after that for about four or five days, I am quite sure of that.

Q. Don't you remember having appeared in Department 41 of the Superior Court when he was arraigned on the 21st of April, 1936?

A. That is right.

Q. And prior to seeing him in Department 41, you saw him when he was down before the Grand Jury?

A. No, I don't think he was before the Grand Jury, Mr. Williams. You are mistaken about that. I think I saw him right after the investigation had closed, when they made the formal arrest, and it was in this regard that I asked Mr. Fitts, the District Attorney of this County, to permit me to see——

Mr. Williams: Just a minute; we are not interested in——

[fol. 1127] A. Just a minute; I am answering your question.

The Court: Just a minute, please.

A. I am explaining.

The Court: Mr. Silverman. When the Court says "Please stop", please stop.

A. I don't know, your Honor, just what is expected of me.

The Court: Are you going to run this courtroom, or am I?

A. No, your Honor.

The Court: If there is any argument about it, I can tell you who is.

A. Well, your Honor——

The Court: Now, Mr. Silverman, will you please be quiet, and wait for a question.

Mr. Williams:

Q. Didn't you first see him after he was arrested on the morals charge on the 21st day of April, 1936?

Mr. Clark: Now, just one moment. I object to that on the ground that it contains irrelevant matter, assumes facts not in evidence, and is immaterial.

The Court: Overruled.

A. I don't know what date that was, Mr. Williams. However, I can explain it, if you wish me to.

[fols. 1128-1129] Mr. Williams: If I desire you to explain it I will ask you the question.

A. I think I have a right to explain an answer, your Honor, after I have answered "yes" or "no".

The Court: Just a minute. You are a witness at the present time. Mr. Clark is capable of making any argument that is necessary. We will get on much better if you don't make any argument.

Mr. Williams: I have no further questions.

Mr. Clark: That is all. Mr. Silverman has indicated a fact to me, your Honor, of importance——

The Court: Put him back.

Mr. Clark: —that I would like to put him back in regard to.

Q. Mr. Silverman, after Mr. James was arrested, I think it is shown that the arrest was the 19th of April, did you make any attempt to see him?

A. I did.

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[fol. 1130] Robert S. James, called as a witness in his own behalf, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Robert S. James.

The Clerk: What is your right name, please?

The Witness: That is the name I have been using for the past 20 years.

Direct examination.

By Mr. Clark:

Q. Mr. James, you were taken into custody, I believe, by investigators of the District Attorney's office on the 19th of April of this year. That is correct, isn't it?

A. Yes.

Q. And did you have any hernia or rupture at that time?
A. I did not.
[fol. 1131] Q. Have you now?
A. Yes.
Q. When did you become ruptured?
A. The night of the 21st of April, I believe.
Q. Where were you when you became ruptured?
A. I was on La Salle Avenue next door to the home where I lived.
Q. How did you become ruptured?
A. A long terrific beating that I was taking from Jack Southard and Charlie Griffen.
Q. Had anything been said to you by them or either of them before the beating commenced?
A. Yes.
Q. About what time did they commence beating you?
A. Well, they started Monday night, I think, about 10 o'clock.
Q. And about what time did they take you into custody?
A. Sunday morning about 9 o'clock.
Q. Now, state whether or not, after taking you into custody, they interrogated you or questioned you in regard to your wife's death?
A. That was the first thing they asked me.
Q. Who first spoke about it to you?
A. Williams did.
Q. You mean Mr. Eugene Williams, the Deputy District Attorney?
[fol. 1132] A. Yes, sir.
Q. Where were you when he spoke about it?
A. I was in my own home on La Salle street.
Q. And who else was present at that time?
A. Well, I think every officer that I ever saw around there was there.
Q. You don't know who they were?
A. There looked like there were 13 or 14 of them.
Q. Well, how long was it after you were taken into custody until you were taken over to the other house?
A. I think about an hour.
Q. And did anyone say anything to you there about your wife's death?
A. That is about all they did say anything about.
Q. Well, do you remember when they—do you remember any time when you were shown any dictaphones?

A. Yes, sir.

Q. Do you remember anything that was said about your wife's death at that time?

A. Yes, sir.

Q. Who was the speaker?

A. Southard and Charlie Griffen.

Q. What was the statement at that time?

A. They told me that I might as well confess to my wife's murder, that they had the case on me and that they overheard my conversations in regard to my wife's death.

[fol. 1133] Q. As near as you can remember is that all that they said then?

A. Well, they said so many things that I cannot remember all that they said.

Q. By the way, at the time they made the arrest, was Mr. Silverman present?

A. No.

Q. Was any person representing you present?

A. No.

Q. After taking you to the house, where this first conversation occurred, where did they next take you?

A. They took me to the District Attorney's office.

Q. About how far was the place where you lived from the District Attorney's office?

A. Well, I wouldn't know how far to say, but out on La Salle Avenue.

Q. I beg your pardon?

A. I wouldn't just say how far it is.

Q. Couldn't you give us an idea.

Mr. Williams: We can stipulate about 7 miles.

Mr. Clark: About 7 miles.

Q. How were you conveyed to the District Attorney's office?

A. I think they took me in the police car.

Q. Who rode with you, if you know?

A. I don't remember the officers that rode with me, now.

Q. Well, was anything said to you concerning your wife's [fol. 1134] death, while you were riding?

A. I don't remember.

Q. Well, didn't—I withdraw that. When you reached the District Attorney's office, were you taken to Mr. Fitts' room directly, or to some other part of the building?

A. I was taken back to the Bureau of Investigation.

Q. How long were you kept there?

A. Well, it seemed to me I was kept there two or three hours.

Q. Do you know who was there with you, if anyone?

A. Well, there were several officers there. I think Mr. Littleton was there and I think a man that operated the dictaphone was there and there was another man there at two or three different times.

Q. Now, was anything said to you while you were there?

A. No, they didn't talk to me much while I was there.

Q. And after being in the Bureau of Investigation some time, you were taken to Mr. Fitts' room?

A. Yes, sir.

Q. And you saw a number of men there?

A. That is right.

Q. And at the time, before being taken to Mr. Fitts' room, did you ask to have your attorney communicated with?

A. Yes.

Q. And whom did you first ask in regard to that?

A. I asked the arresting officer.

[fol. 1135] Q. When?

A. Sunday.

Q. Did you state whom your attorney was?

A. Yes, sir.

Q. Did you ask to have him communicated with at any time after the time of your arrest?

A. Yes.

Q. When did you next make the request?

A. I asked them again the night they were taking me up to the District Attorney's office to question me in regard to my wife's death.

Q. Now, at the time that you made that request, did you know Mr. Silverman's telephone number?

A. I had his office number.

Q. Did you give that office number to anyone and request that he be communicated with?

A. I gave it to Mr. Fitts.

Q. You gave it to Mr. Fitts?

A. Yes, sir.

Q. Did you ask Mr. Fitts that you might have your attorney present?

A. Yes, sir.

Q. And what did Mr. Fitts say, if anything?

A. He said he called Mr. Silverman and found that he was out of town and then I asked for Mr. Parsons and he said that Mr. Parsons didn't know anything about the case [fol. 1136] and it would take too long to look the transcript over and he couldn't see me.

Q. Then they started to question you in the District Attorney's office?

A. Yes, sir.

Q. And now, prior to your getting to the District Attorney's office, were any threats in the District Attorney's office made to you in connection with you making or not making a statement?

Mr. Barnes: That is objected to as calling for a conclusion of the witness?

The Court: Overruled.

A. You mean in regard to my wife's death?

By Mr. Clark:

Q. Yes.

A. Read the question again, please?

(Question read by the reporter.)

Mr. Clark: May I reframe that question? That is not what I intended to ask.

Q. Mr. James, before you reached the District Attorney's office did anyone make any threats in connection with your making any statement concerning your wife's death?

[fol. 1137] Mr. Barnes: That is objected to on the ground it calls for a conclusion of the witness.

The Court: Overruled.

Mr. Barnes: We have no objection to what was said.

The Court: I think the form, as to whether there were any threats, or statements of that sort used, and as to whether the statement was voluntary——

Mr. Barnes: As to being free and voluntary—very well, your Honor.

The Court: —basically they do call for a conclusion, but I think they are properly called for.

Mr. Clark: It is like one of those conclusions of fact, your Honor, like a man being drunk. Go ahead, Mr. James.

A. Well, I was threatened when I was first arrested on the murder charge, and I was threatened when they took me to the District Attorney's office.

Q. Well, there is some confusion. I am referring now to the day of your arrest, and to the period before you reached the District Attorney's office on that day. Weren't you taken to the District Attorney's office an hour or so after you were arrested?

A. On what charge?

Q. Never mind what charge. When the officers first took you into custody, didn't they take you to the District Attorney's office in an hour or two?

A. Yes.

[fol. 1138] Q. Now, during that hour or two, when you had been taken into custody, and before you were taken to the District Attorney's office, were any threats used upon you, in connection with any statement, or refusal upon your part to make a statement concerning your wife's death? Just answer that "yes" or "no".

A. Yes.

Q. Who made those threats?

A. Mr. Southard, and Charlie Griffen.

Q. And what threats did each of them use?

A. Well, when they arrested me, and taken me next door, they told me that they were of the opinion, and had known about my killing my wife, and I had just as well confess it to them, or they were going to beat the Hell out of me.

Q. Now, were any more threats made by any one before you reached the District Attorney's that day?

A. I don't remember.

Q. Very well. Now, note carefully the question: Was any promise made, or any statement made of any advantage that you might gain, if you would make a statement concerning your wife's death, before you reached the District Attorney's office on the day you were arrested, personally?

The Court: You may answer that "yes" or "no", first.

A. Well, no; it was after.

By Mr. Clark:

Q. Now, after you reached the District Attorney's office, and before you were taken into Mr. Fitts' room, did any [fol. 1139] person make any statement to you concerning any advantage, either then or thereafter, that you might gain, if you would make a statement concerning your wife's death?

A. Before I had reached the office?

Q. Before you reached Mr. Fitts' room?

A. No.

Q. Now, when you were in Mr. Fitts' room, was any statement made there concerning any advantage which you might gain, or any punishment you might escape if you made a statement concerning your wife's death?

A. No.

Q. While you were in Mr. Fitts' room were any threats of any kind made?

A. Not at that time.

Q. Were any threats made in the District Attorney's office while you were being taken to Mr. Fitts' room?

A. Not that I remember.

Q. Just a moment. Now, during the time you were there in Mr. Fitts' office, did you tell--I believe I misstated that. Now, while you were in Mr. Fitts' office, were any questions asked you regarding your wife's death? I refer now to the first time that you were in Mr. Fitts' office.

A. Why, yes, they questioned me about her death.

Q. And will you state whether or not you told him that you did not want to discuss it?

[fol. 1140] A. Yes, I told him I didn't want to discuss it.

Q. When you told them that, they kept on questioning you?

A. They questioned me quite a little while.

Q. You mean by that they didn't stop?

A. No.

Q. About what time of day was it when you left the District Attorney's office?

A. That day?

Q. Yes.

A. I think it was along in the afternoon, 4:00 or 5:00 o'clock.

Q. And I believe you have already told us you were taken down to the house next to the house where you had been living?

A. That is right.

Q. And were handcuffed while you were being taken there?

A. No.

Q. Do you know who went with you down to that house?

A. I think Mr. Southard and Charlie Griffen were taking me down there.

Q. And upon reaching there, what did they do? What did they do?

A. Well, they took me in and set me down, and pulled down the shades in the house, and began to question me.

Q. What were they questioning you about?

A. My wife's death.

[fol. 1141] Q. And did you answer those questions?

A. I did answer everything they asked me.

Q. And then what happened?

A. Well, they kept that up, I think, until Wednesday morning, but the record says Tuesday, so they kept it up until Tuesday morning constantly.

Q. And Mr. Griffen and Mr. Southard were there with you all the time?

A. No, they were not there all of the time. They had, I think, 15 or 20 officers took me on reliefs about every three hours.

Q. Well, what time did they allow you for sleep?

A. I didn't get any sleep.

Q. Now, during the course of the conversations, did they offer you any reward, or anything of value, or make any promise to you of anything, of any gain that you might get if you would make a statement implicating yourself in your wife's death?

Mr. Barnes: Just a minute. That is objected to, if the Court please, on the ground that it is indefinite as to which particular time counsel is inquiring about, and it is in the course of the confession.

The Court: I think that did have that tendency, Mr. Clark.

Mr. Clark: I asked that inadvertently, and I did not intend to, and the question is withdrawn.

[fol. 1142] Q. In the course of the conversation is what I intended to say, before you were brought to the County jail, at that house, and after you had been at the District Attorney's office, did any one hold out any hope of reward, or promise of immunity, or any advantage of any sort, that you might gain, if you would make some statement implicating yourself in your wife's death?

A. Well, Mr. Williams——

Q. What did Mr. Williams say?

A. Well, he told me that they had enough stuff on me to hang me, and that they were going to hang me for it, and that he had the authority to give me a lighter sentence

if I would come clean and tell him the full story about it. He told me that if I would tell him the truth about it that he could get me a life sentence, and that he might get me off at manslaughter, if I would tell him the story.

Q. Now, about what time of day or night did this conversation with Mr. Williams occur?

A. Well, it was way in the night; I think maybe 3:00 or 4:00 o'clock in the morning.

Q. And it was a Sunday, as I understand, that you were taken into custody?

A. That is right.

Q. And this was along in the early hours of Monday morning?

A. It was either Tuesday morning or Wednesday morning.

[fol. 1143] Q. Now, you spoke about Mr. Southard and Mr. Griffen using physical force on you. Will you tell us how that came about?

A. Well, they had been questioning me every minute, the same questions over and over, since I had been there. And either Monday night, or Tuesday night—I have the two days confused—about 10:00 o'clock he was trying to get me to admit that I spent the night with some woman in the hotel on the 11th of August, and I didn't know what he was talking about.

Q. Who was talking?

A. Mr. Southard. Finally he said that I was lying like a dog, and he began to beat me.

Q. How long did he continue to beat you?

A. He jumped over and began to beat me, and I got hold of him, and he stopped, and then he jumped over and began beating me again. When I stopped him, Charlie Griffen knocked me loose. I told them that I had answered every question, and I didn't know what they were talking about when they were talking about this woman. And he began to question me about it again, and then several minutes later he did it again, and I grabbed hold of him again, and Charlie Griffen knocked me loose. I said, "There is no use to beat me." I told them if they wanted me to say that I stayed in the hotel with this woman I would say it. They were not satisfied with that. If they asked me a question, [fol. 1144] and if I answered it, he hit me, and if I attempted to explain, or did not answer, he would hit me. And he turned me over in that chair several times.

Q. Now, finally what did you do, as the result of the physical force that was used upon you there?

A. Well, they finally quit beating me sometime in the night, and then Mr. Williams takes hold of me and told me if I confessed I would get less punishment, and that I might get a life sentence. I told him that I couldn't tell him anything about it.

Q. And how long after talking to Mr. Williams, how long was it after that that you were taken to the County jail?

A. About the time that Mr. Williams got through talking to me I collapsed, and I didn't know anything until the next day.

Q. You mean that you fainted?

A. Yes, I fainted, or passed out.

Q. At what time the next day, as near as you can tell us, was it that you regained consciousness?

A. Well, I came to the next morning. I think it must have been 8:00 or 9:00 o'clock.

Q. Were you at the same place?

A. Yes, sir.

Q. Were the same people there?

A. Well, I don't just remember who was there. There was an officer named Davis there. Whether Mr. Southard [fol. 1145] and Griffen were there, I don't know.

Q. Now, were any further threats made to get you to make a statement concerning the facts of your wife's death while you were at the house—we have got to the point now where you regained consciousness——

Mr. Barnes: As to the form of the question it is objectionable.

The Court: Yes, it is objectionable. You can change the question.

Mr. Clark: Yes, your Honor.

Q. Were any further questions asked you by any one concerning the circumstances of your wife's death, after you regained consciousness, and before you were taken to the County jail?

A. Well, I was pretty groggy when I regained consciousness, and I hardly remember what was said there.

Q. And then you were taken to the County jail, as I understand it, about the 21st of April, and remained there, except when you were taken out to court and the Grand Jury, until the 2nd of May, is that about as you remember it?

A. Yes.

Q. And on the 2nd of May you were taken into the Chaplain's room, Mr. Southard, Mr. Griffen, and Mr. Killion, and Mr. Lynch—is that the name?

Mr. Barnes: Lynch was the court reporter.

Mr. Clark: Yes, Lynch was the court reporter.

[fol. 1146] Mr. Williams: May I interrupt, Mr. Clark? While I haven't any objection to the asking of leading questions, I think at this time the witness should be required to make his own statements instead of simply answering "yes" or "no" to counsel's statements.

Mr. Clark: I tried to avoid leading questions except in a matter such as this, where I believe the question is purely preliminary and I was asking it in the interest of time.

The Court: You may proceed. If there is any objection to your questions we will take the objections up as they come.

Mr. Clark: Is that right? Do you remember the incident, whatever date it was?

A. I remember going to the Chaplain's room, yes.

Q. And did you see Mr. Griffen and Mr. Southard there at that time?

A. Yes.

Q. Did you recognize them?

A. I did.

Q. Will you state whether or not you still had a memory of the physical force that had been used upon you before?

A. I will always remember that.

Q. Will you state whether on that second of May you were still suffering pain from the injuries you had received?

A. I was.

Q. At the time you were taken to the jail, besides this hernia, did you have any marks or bruises on you as the [fol. 1147] result of the force that had been used?

A. Do you mean when they first put me in jail?

Q. Yes.

A. Yes, I was black and blue from my waist up.

Q. Was any part of your head or face injured?

A. Yes, both of my ears were swollen so that I couldn't hear.

Q. What was the condition of your ears on this day when you were taken to the Chaplain's room?

A. I think my ear was still black then.

Q. By the way, had Mr. Silverman, before you were taken to the Chaplain's room, given you any instructions as to

what you should do if you were questioned further by the officers?

A. He had.

Q. What instructions did he give you?

A. He told me I was going to be indicted for murder and if the officers questioned me to tell them that I wouldn't talk unless he was there.

Q. When Mr. Silverman told you that you were going to be indicted for murder, did you believe that you would be?

A. I did.

Q. Now, when you were taken into the Chaplain's room, what effect upon your mind did the presence of Mr. Southard and Mr. Griffen there have?

A. Well, I thought I was in for another beating.

[fol. 1148] Q. And did you feel free to talk in their presence?

A. I did not.

Q. Now, what effect did Mr. Silverman's instructions have upon your mind? Did you feel that you should follow those instructions?

A. I felt that I should do just what he told me.

Q. Then taking the circumstances as they existed at the time you were in that room when Mr. Williams told you what he claimed Mr. Hope had said, did you feel free, under the circumstances as you knew them to deny the truth of the statement that Mr. Williams communicated?

A. I was afraid to deny it.

Q. And now, do you recall a second occasion when you were taken to the District Attorney's office?

A. I do.

Q. With relation to the time you were in the Chaplain's room, when was this second occasion?

A. It was on a Saturday; I don't remember the date.

Q. Do you remember whether it was the same day, before that day or after the day that you were in the Chaplain's room?

A. It was the same day I was taken to the Chaplain's room.

Q. About what time of day was it you were taken to the District Attorney's office?

A. I think it was shortly after noon.

[fol. 1149] Q. Who took you over there?

A. I believe Mr. Gray took me over there; I am not sure.

Q. He is one of the deputy sheriffs, is he?

A. He is.

Q. Works with Mr. Killion?

A. He does.

Q. And now, to what part of the District Attorney's office were you first taken?

A. I was taken to Mr. Fitts' office.

Q. And did you, at any time, see Mr. Southard there?

A. Yes, he was there.

Q. When did you see him?

A. He was there practically all the time I was there.

Q. And when you reached Mr. Fitts' office, besides Mr. Southard, was there anyone else in there that you remember?

A. Yes, sir.

Q. Who else did you remember being in there?

A. I remember Charlie Griffen being there and most all the officers that I had seen were there.

Q. And now, will you state whether or not at any time you had a conversation with Mr. Southard in which just you and Mr. Southard took part?

A. State what the conversation was?

Q. No, just state whether you had such a conversation first.

A. I did.

[fol. 1150] Q. With reference to the time you were taken into Mr. Fitts' office when did that conversation occur?

A. It occurred about 10 o'clock that night.

Q. Where were you?

A. I was in one of the offices there; I don't know whether it was Mr. Fitts' office or the one next to it.

Q. Was anyone else present besides you and Mr. Southard?

A. No, they all cleared the room and left me with him.

Q. What did Mr. Southard say to you then?

The Court: Just a moment, do I understand that this is subsequent to the matter the admissibility of which is involved?

Mr. Clark: Yes, your Honor. In going into matters subsequent to that I directed your Honor's attention to that specifically, the thought that a subsequent statement to the date which this evidence relates would come before your Honor sooner or later, and unless counsel objected, I would go into it now.

The Court: Strictly speaking this is not voir dire testi-ony now.

Mr. Clark: No, it is not.

The Court: You may proceed.

Mr. Williams: May I make a statement? I don't object it because I anticipated we could clear the entire matter o before the other statements were offered.

Mr. Clark: I think the Court was just trying to clear up fol. 1151] the entire matter. We talked in chambers this orning and I think the Court agreed with me.

* * * * * * *

fol. 1152] (Question read by the reporter as follows: What did Mr. Southard say to you then?")

A. I sat at the desk and he said to me, "You have been itting here lying to Fitts all evening just like you lied o me when I had you out at the house." He said, "I didn't ave the dope on you then, but I have got it on you now," nd he said, "You are going to tell the truth here now or am going to take you back to that house and I am going to eat your God damned head off."

Q. Did you make any answer to that?

A. I told him that I was ill from the beating that I had aken before, that I wasn't able to take another beating and fol. 1153] that if he wanted me to say what he was relating o me in Hope's story there that I would gladly admit it and ave myself other punishment.

Mr. Clark: If your Honor will pardon me, there was one natter testified to by Mr. Southard that I didn't hear dis-inctly.

Q. Mr. James, it was testified to earlier today that in a onversation with Mr. Southard that you said to him in ffect that your wife was nothing but a prostitute before ou married, and that he struck you for that reason. Did ou make any such statement in substance or effect to him?

A. I did not.

Mr. Clark: That is all.

Cross-examination.

By Mr. Williams:

Q. Mr. James, following the time that you say Captain outhard and Mr. Griffen beat you at the house, did you

make any confession to them or either of them of any crime?

A. No, I didn't admit any crime to them.

Q. And prior to the time that I appeared in the Chaplain's office in the county jail with Charles Hope and Captain Southard and Mr. Griffen and Deputy Sheriffs Killion and Gray and Mr. Lynch, the statement reporter, did anybody at that time tell you that you were going to be beaten, or threaten you in any way before I made the statement and you answered certain questions?

[fol. 1154] A. They didn't tell me they were going to beat me when they took me in there.

Q. Didn't offer you anything of any sort, did they?

A. Not in there.

Q. As a matter of fact, there wasn't anything said to you by anybody until Mr. Lynch, the statement reporter who was on the stand this morning, sat down with his notebook open and then the first question that was asked you was after he sat down, wasn't it?

A. No, the first thing was said to me when I walked in, you were talking to me.

Q. The first thing I said to you was, "Do you know this man Chuck Hope?" that was the first thing that was said to you, wasn't it?

A. I don't think that is the first thing you said to me.

Q. What is your recollection?

A. My recollection of the first thing that you said to me when I walked in that room you said, "Mr. James, you told me when I was out at the house questioning you about your wife to tell you how she got in that fish pond, that you couldn't tell me." You said, "Now, I am going to tell you." and after sitting there a few seconds Hope entered the room and you asked me if I knew Hope, and I told you I did.

Q. Yes. Now, after you had made the statement everybody went out of the room and you were returned to your cell in the jail, were you not, or your tank in the jail?

[fol. 1155] A. That is right.

Q. And you were taken from the tank by Deputy Sheriff Killion and returned to the tank by Deputy Sheriff Killion?

A. I don't know whether it was him or Gray, one of them.

Q. Either him or Gray or both of them?

A. Yes.

Q. Then later that same day you were taken out of the county jail by Killion and Gray?

A. Yes, I think they were the ones.

Q. And Killion and Gray stayed with you during the balance of the time, all the time that you were out of the county jail until they returned you to the county jail, did they not?

A. No.

Q. Was there any time when they weren't with you?

A. Yes.

Q. What time?

A. At the time you fellows cleared the room for Mr. Southard to question me.

Q. I wasn't there any day that you were questioned in the District Attorney's office on the 2nd of May, was I, after you were taken out of the jail?

A. I couldn't say positive that you were there, but nearly all the officers I had seen were there that night.

[fol. 1156] Q. Mr. Fitts and Mr. Stewart were there, were they not?

A. I don't know if I know Mr. Stewart.

Mr. Clark: Will Mr. Stewart stand up?

(Mr. Stewart stands.)

Mr. Williams: Do you recognize Mr. Stewart?

A. I don't think I do.

Q. Mr. Fitts and Mr. Stewart were there, and there was no time when Mr. Gray and Mr. Killion were not there, was there?

A. There was nobody in the room when Mr. Southard questioned me but him.

Q. As a matter of fact, you told Mr. Fitts on that occasion that the entire District Attorney's office couldn't make you talk, and wouldn't have been able to make you talk, except that Hope told his story, so you were going to talk? Isn't that a fact?

A. No.

Q. Now, let me direct your attention to a transcript here——

Mr. Clark: May I see it?

Mr. Williams: Yes, Mr. Clark. Just this question and answer, and I ask you not to examine anything but that.

Mr. Clark: I shall examine just what you are asking about.

Mr. Williams: Just this question and answer; that is all.

Mr. Clark: Pardon me, Mr. Williams, is it this part?

[fol. 1157] Mr. Williams: Yes, it is right there.

Mr. Clark: I infer that the portion to which you direct my attention, Mr. Williams, is a part of the transcript of the notes that were taken in the conversation which the defendant testified occurred after the talk between him and Mr. Southard?

Mr. Williams: That is correct.

Mr. Clark: I wish to object to any use of it on the ground that it is incompetent. You can't establish that the confession was free and voluntary by showing what was said in the statement; I don't call it a confession; you can't show that it was free and voluntary by reading it, or reading part of it.

Mr. Williams: If your Honor please, I submit that that is one of the best ways in the world to show that a statement is free and voluntary. If the defendant, in the course of the statement, makes statements which indicate clearly the motives which impel him to make his statement, and those motives are other than threats or violence, that fact, it seems to me, must be very pertinent, for the Court to determine, and for the jury to determine whether any confession he did make was the result of any force or violence used, or whether it was caused by other things.

Mr. Clark: If that were true, you could beat the life out of a man and overcome testimony as to the beating that he got by proving that he said his statement was free and [fol. 1158] voluntary when it was made immediately after the beating and as a result of the beating. I can't feel that that is the law.

Mr. Williams: This goes beyond that, your Honor.

The Court: I think it becomes a question of fact that we can't determine without getting this evidence. Usually at the end of all of these statements there appears a declaration that the statement is made freely and voluntarily. Of course, if the entire statement as a whole was the result of undue influence, either by threats, or promise, or violence, we might come to the conclusion that that statement was also a product of that same inducing cause, but the fact the witness did make that statement can be considered. It goes to the weight rather than to the admissibility. The objection will be overruled.

By Mr. Williams:

Q. Now, Mr. James, I call your attention to the fact that this statement is a statement taken in the presence of District Attorney Fitts, Chief Deputy District Attorney Robert S. Stewart, C. L. Plummer, Chief of the Bureau of Investigation, Charles Griffin, Assistant Chief of the Bureau of Investigation, Jack Southard of the Bureau of Investigation, Everett Davis of the Bureau of Investigation, Deputy Sheriff Killion, Deputy Sheriff B. B. Gray, and Dorothy Adams, reporter, taken in Mr. Fitts' office in the Hall of Justice, beginning at 1:55 A. M. May 3rd, 1936, and I particularly call your attention to the portion of it which I will [fol. 1159] just lightly mark here, and direct your attention to the fact that the "he" referred to in this question is Charles Hope, and ask you whether at that time the following question was not asked, and the following answer given by you: "That is what he told you? (meaning Hope) A.—Yes, I said, 'What did you do with her, leave her in the bath tub?', and he said, 'No, I threw her in the fish pond.' I said, 'That won't stick; they will throw me in the jug when they find her. I will be a good sport. You made a God damn fool of yourself and me both, but I will take the rap. I won't talk. There ain't enough men in the District Attorney's office to make me talk.' and there wasn't if he hadn't told it. You never would have got me to talk, so of course I arranged with this couple to go home with me." Did you make that statement there?

A. After Mr. Southard there had told me——

Q. Just answer the question "yes" or "no".

Mr. Clark: Now, I submit, if your Honor please——

A. At that particular time, yes.

The Court: The witness can answer the question first, and then you can take the matter up on redirect examination and get any additional answer he desires to make.

Mr. Clark: Before we proceed, it is my understanding that where a part of a statement or conversation is used, that the other side have a right to such other parts as may [fol. 1160] tend to throw light upon that which has been used. Mr. Williams handed me his copy of the transcript, and submitted only this one statement. May I not have a right to inspect all of his transcript, to see whether there are other portions which I wish to use for the light they may throw on this?

The Court: I think you are probably confusing the rule which applies with another rule. Mr. Williams could have very properly asked the witness the question, reading it to him, without ever showing it to him, purely as a matter of cross examination. You could, on redirect examination, ask for any further part of the conversation sheding light on the matter.

Mr. Clark: Yes, but where Mr. Williams shows a certain portion of the transcript for the purpose of framing accurately the question that he asks, haven't we the right to inspect the whole of the transcript?

The Court: I think not, except in those cases where the document was signed by the witness, and made his own, or where the witness thereafter read it and acknowledged it, or something of that sort. In other words, up to the present time it remains the District Attorney's memorandum.

Mr. Williams: Yes, it is simply a memorandum.

Mr. Clark: Probably your Honor is entirely right, and certainly right for all purposes in this case.

Mr. Williams:

Q. Now, Mr. James, it is a fact, is it not, as stated by you, [fols. 1161-1165] that the only reason that you ever told details of the death of your wife, Mary James, was because this man, Charles Hope, to your knowledge, had made a statement implicating you, and you desired to implicate him also?

A. No.

Q. That is not the fact?

A. No.

Q. Mr. James, have you been convicted of a felony?

Mr. Silverman: Just a moment.

The Court: Do you have an objection?

Mr. Clark: There is no objection.

Mr. Williams: Answer that question.

A. Yes.

Q. You were convicted of three felonies in the Superior Court of this County, were you not?

A. Correct.

Q. And those felonies were the crimes of incest?

A. Yes.

* * * * * * *

[fol. 1166] By Mr. Williams:

Q. Isn't it a fact that when you went out to the premises [fol. 1167] at 3886 La Salle Street, next door to where you lived on the 19th of July, after you had been taken to the District Attorney's office about the 19th of July, whether Captain Southard and Mr. Griffen left you and they didn't talk to you until 3:00 or 4:00 o'clock in the morning, didn't talk to you at 10 o'clock that night at all?

A. The officers were in and out of there so often——

Q. Just answer the question "yes" or "no".

The Court: Do you want the question read again? Please read it, Mr. Reporter.

(Question read by the reporter.)

By Mr. Williams:

Q. In other words, they didn't talk to you at 10 o'clock that night as you have previously testified?

A. I don't remember when they left there.

Q. Now, you said you had a conversation with me. You had that conversation with me on the night between the 20th and 21st of April, did you not?

A. I had two conversations with you.

Q. At your house I mean, referring to conversations at your house.

A. Yes, sir.

Q. And you had only one conversation at that house?

A. The only one I remember now.

Mr. Williams: Stand up, Mr. Davis.

(Gentleman stands up in courtroom.)

Q. Do you recognize Mr. Davis who just stood up?

[fol. 1168] A. Yes, sir.

Q. Do you remember that he was with me the time that conversation took place and during the entire time that the conversation took place with you?

A. I remember him being there, but I don't remember that he was there when you were questioning me.

Q. Don't you remember that you were sitting in a big room there and I was sitting in one chair and Mr. Davis was sitting in another chair between us?

A. I was in pretty bad shape at the time you were talking to me. I don't remember whether Mr. Davis was there at that particular time or not.

Q. And at that time I talked with you about an hour?

A. You did.

Q. And the first thing you said or rather the first thing that I said was that I was the Deputy District Attorney in charge of this case and I wanted you to know that I was not in a position to make any promises or offers of any kind or character to you and that any statement you made to me would have to be freely made by you?

A. That is what you said.

Q. And isn't it a fact that the entire time that I talked to you, Mr. Davis sat between us in the front room at 3886 South La Salle Street?

A. I am not sure of that.

Q. And isn't it a fact that what I said believed that you [fol. 1169] had killed your wife, Mary James, and I believed that that killing on your part was caused by a sadistic impulse on your part? Isn't that what I told you?

Mr. Clark: Just a moment, I object to that upon the ground that it is utterly immaterial, if he did tell him that.

The Court: I think that question is proper; the objection is overruled.

A. You told me you thought I killed her all right.

By Mr. Williams:

Q. And didn't I tell you that there was nothing that I or any other officer could promise, that the only thing we could do was to have you answer the questions and if you wanted to answer the questions and if you didn't you need not, isn't that a fact?

A. No.

Q. And in addition to that, didn't I ask you, for a great deal of the time that I was talking to you, about another matter entirely than your wife's death?

A. I don't remember you talking about any other matter.

Q. Do you remember me mentioning the name of Lois Wright?

A. I don't think so.

Q. Do you remember me asking you a great many questions, without going into detail, a great many questions touching your relations with Lois Wright.

The Court: I think that has been asked and answered; the objection is sustained.

By Mr. Williams:

Q. Isn't it a fact that less than half of the time I was [fol. 1170] talking to you was in regard to the discussion about your wife, Mary?

A. All the time was in regard to my wife's death.

Q. Do you remember the first conversation I had with you was in your house on the 19th of April?

A. I remember the first word you said to me.

Q. What was it?

A. The first word you said to me when you entered the front room, Jack Southard told me I was under arrest and I said, "You brought enough men to get me." And the first thing you said to me was, "When we go after a killer, we take no chances." That was before you wrote the transcript out.

Q. Isn't it a fact that the first words I said to you were said to you after you had been taken from the room in which you were arrested into the dining room of your house and the words that I said were, "This girl is your niece?" And you said, "Yes"?

A. That is the last time; I said, "Yes."

Q. Now, at any time while you were in the company of Mr. Fitts, and while you were making the statements you made to Mr. Fitts, was any person there who beat you or threatened to beat you or offered you anything in the way of reward?

A. Just what time are you talking about?

Q. The time when you were in the presence of Mr. Fitts.

A. At the time I was there for identification?

[fol. 1171] Q. And at any time when you were in the presence of Mr. Fitts——

A. I won't say in the presence of Mr. Fitts.

Q. Yes. And the first time you talked with Mr. Fitts you told him you did not desire to make any statement, did you not?

A. That is right.

Q. And at that time he didn't question you about the death of your wife, Mary, at all did he?

A. Yes, he asked me about her.

Q. I am asking you if Mr. Fitts did?

A. He asked me about that, too.

Q. And the next time you talked with Mr. Fitts was on the 2nd of May, the day you were taken from the County jail, and were taken out to the premises at 1326 Verdugo Road, and then later taken to the District Attorney's office?

A. That is my best recollection.

Q. And those were the only two times that you talked to me, were they not, those two days?

A. As far as I can remember now, they are.

Q. Now, during the course of that day, upon the 2nd and 3rd of May, you ate some sandwiches, and drank some coffee in the District Attorney's office, did you not?

A. I drank some coffee.

Q. You were offered sandwiches, were you not?

A. I sent out and bought a couple, and somebody ate [fol. 1172] them before they got to me.

Q. Well, did you, yourself, eat any sandwiches?

A. They told me that the Deputy ate them.

Q. Well, did you, yourself, eat any sandwiches?

A. I don't remember eating them.

Q. Then after that Deputy Killion and Gray and you went out and had a dinner together, did you not?

A. Yes, sir.

Q. And while you were having the dinner, you had a conversation with Mr. Killion and Mr. Gray and Mr. Davis, in which you discussed the incident of the death of your wife, Mary?

Mr. Clark: Just a minute. That is objected to as incompetent, irrelevant and immaterial.

The Court: You may answer "yes" or "no".

A. I discussed to the best of my recollection what they had suggested that I should tell them.

By Mr. Williams:

Q. And after you came back——

The Court: Just a minute. That question might be misunderstood. Just what do you mean by that, Mr. James?

A. I mean that I promised them that if they would send me out to get something to eat, after hearing Hope's story, that I would think about it.

The Court: In other words, when you were out with Killion and Gray you went over the story?

A. Yes, sir.

[fol. 1173] By Mr. Williams:

Q. When you got back to the District Attorney's office, in the presence of Gray and Griffen, Southard and Mrs. Dorothy Adams of the District Attorney's office, you did make a complete statement to Mr. Fitts of your version of the death of your wife, Mary, that is a fact, isn't it?

A. I told him the best I could, what they told me.

Q. Now, did Mr. Killion, or Mr. Fitts, or Mr. Gray ever lay a hand on you?

A. No, sir.

Q. Or threaten you in any way?

A. No, sir.

Q. Or offer you anything?

A. No, sir.

Mr. Williams: That is all.

* * * * * * *

[fol. 1174] By Mr. Clark:

Q. Mr. James, in response to one of Mr. Williams' questions, you stated that you had been convicted of three felonies, and in that connection I ask you if it is not true you have an appeal from such convictions now pending in Department——

Mr. Barnes: We submit that is not material.

Mr. Clark: I submit if he has an appeal that is undetermined, he is not convicted.

Mr. Barnes: I have authorities.

The Court: I am going to overrule the objection. It is merely a question of having the question asked. I don't think it makes much difference. You can answer the question.

A. I have an appeal.

* * * * * * *

[fol. 1175] Dr. George B. Gilmore, recalled as a witness in behalf of the People, having been previously sworn, testified as follows:

Direct examination.

By Mr. Williams:

Q. Dr. Gilmore, you have been practicing medicine in Colorado Springs for how many years?

A. 32 years.

Q. And have you had occasion to observe in your experience as to whether there is a difference in the effect of drinking alcoholic beverages by the person who drinks them, as to whether the liquor, if taken at a higher altitude, say of Pike's Peak, which is about 14,000 feet, or at a lower altitude?

Mr. Clark: Just one moment. May I have that question read?

[fol. 1176] (Question read by the reporter.)

The Court: You may answer, Doctor.

A. It is much more effective at the high altitude, that is, a similar amount taken at say an altitude of Colorado Springs, 6,000 feet, and the average air condition, than say on the top of Pike's Peak.

Mr. Williams: That is all.

Cross-examination.

By Mr. Clark:

Q. Doctor, I take it you are a college man, and an educated man?

A. Well, I have been since 1904.

Q. You have been out of college since 1904?

A. Yes, sir.

Q. You are not familiar with the early history of some of the early mining camps, I take it?

A. Well, I have heard of many such.

Q. Well, it is a fact, is it not, that during the mining excitement back in the '70's that men would go from the lower altitudes in Colorado up to Leadville and drink the

same quantity of liquor that they had been drinking at five or six thousand feet——

Mr. Williams: We object to it is calling for hearsay as to what happened in 1870.

The Court: Let us have the question. Do not answer [fol. 1177] until I have a chance to rule on it, Doctor. Suppose you read the question as far as Mr. Clark got.

Mr. Clark: I think I will withdraw the question and concede that the objection is well taken.

Q. Doctor, the difference between the lower altitude, and the higher altitude is simply a difference in atmosphere-pressure, isn't it?

A. You mean in regard to the alcohol?

Q. No, in regard to the altitude.

A. That is one menace.

Q. And that lighter air has certain physical effects, doesn't it?

A. It sometimes may.

Q. And that lighter air, that is most likely to be affecting the heart and the lungs, isn't it?

A. Yes, I think so.

Q. The lighter air may cause, by reducing the atmospheric pressure, cause the heart to beat more slowly, isn't that so?

A. I cannot answer that question, except in the question of exercising an opinion.

Q. Now, there is less oxygen in the cubic foot of the air at the higher elevation than there is at the lower elevation?

A. I believe that is correct.

Q. And it is the oxygen that the body requires to take in through the lungs?

[fol. 1178] A. Well, the lungs do take in oxygen.

Q. Of course, the air consists of oxygen, and hydrogen——

A. Of course, atmospheric conditions come in, as well as the lack of oxygen.

Q. The fact that a man is at a higher place, he discharges the same air as at a lower place?

A. They say that he does not.

Q. You say that the alcohol has a different effect, and is that effect purely a psychological effect, or physiological effect?

A. I think it would be a physiological effect.

Q. And in just what way does the physiological effect take place at a higher altitude?

A. Well, the individual that would be intoxicated, or under the influence of liquor, would be of a greater degree in a higher altitude.

Q. Do you express that opinion as the result of your personal observation, or reading, or both?

A. Both.

Q. Would you be kind enough to tell us what medical works you have read, in which that is stated to be a fact?

A. I don't think I could do that.

Q. Now, you cannot find—you cannot remember that you ever read it in any medical book that was ever published, can you?

A. Well, that is a conclusion that I arrived at by observa- [fols. 1179-1183] tion of patients.

Mr. Clark: That is all.

Mr. Williams: That is all, Doctor.

* * * * * * *

[fol. 1184] Ethel Smith, recalled as a witness in behalf of the Defendant, having been heretofore duly sworn, testified as follows:

Direct examination.

By Mr. Parsons:

Q Mrs. Smith, will you speak up so that all the folks in the jury can hear you? You have previously testified, have you not?

A. Yes, sir.

Q. And you know the defendant here, Mr. Robert James, do you?

A. Yes, sir.

Q. Do you recall the incident of Mr. James' arrest on or about the 19th of April of this year?

A. Yes, sir.

Q. And had you had occasion to see the defendant, James, shortly before his arrest on the 19th?

A. Yes, sir.

Q. And when was it that you had seen him?

A. On Friday before the Sunday.

Q. On Friday before the Sunday of his arrest?

A. Yes, sir.

Q. And did you have occasion to observe his facial appearance and his face?

A. Yes, sir.

Q. Mr. James, will you step over here by the witness [fol. 1185] just a moment, please? If I may have him come over here that she may examine him, your Honor?

The Court: Yes.

By Mr. Parsons:

Q. Now, will you examine the face and head and ears of Mr. James? Will you turn your head, Mr. James, please? Thank you. Now, will you take your seat again, please? May the record show that the defendant James approached the witness stand, that the witness took a look at his face and head?

Now, at the time that you saw Mr. James on Friday before the arrest, did you notice any difference between the appearance of his face and ears then and as they now appear?

A. No, sir.

Q. Now, shortly after Sunday, the 19th, the day of his arrest, did you see Mr. James?

A. I don't know just how many days it was.

Q. Well, was it a matter of a few or several days?

A. It was after the Grand Jury hearing.

Q. It was after the Grand Jury hearing?

A. Yes, sir.

Q. And where was it that you saw Mr. James upon that occasion?

A. In the county jail.

Q. In the county jail?

A. Yes, sir.

[fol. 1186] Q. And where in the county jail was it that you saw Mr. James?

A. First, through the screen, and then in the attorneys room.

Q. First, through the screen, and then in the attorneys room?

A. Yes, sir.

Q. And in the attorneys room, how close were you to Mr. James?

A. Probably two or maybe three feet.

Q. Probably two or maybe three feet?

A. Yes, sir.

Q. You were sitting on one side of the bench, and he on the other, is that right?

A. Yes, sir.

Q. Was there anything between you and his head or face?

A. Just a low board.

Q. Well, his head stuck up above the board, didn't it?

A. Yes, sir.

Q. And did you have a good view of his head and face?

A. Yes, sir.

Q. What was the condition of light then prevailing? Could you see clearly?

A. Yes, sir.

Q. And what, if anything, did you observe about the condition of his ears or face at that time?

[fols. 1187-1245] A. His left ear was very red and badly swollen.

Q. His left ear was very red and badly swollen?

A. Yes, sir.

Q. Did you notice anything unusual about the other ear?

A. It was real red.

Q. Now, without telling what the conversation was, did you have a conversation with Mr. James at that time with reference to the subject as to how he had come by this condition, which you observed?

A. Yes, sir.

Mr. Parsons: Cross examine.

Mr. Williams: No cross-examination.

* * * * * * *

[fol. 1246] Dr. Paul E. Bowers, called as a witness in behalf of the Defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Paul E. Bowers.

Direct examination.

By Mr. Clark:

Q. Dr. Bowers, you are a physician and surgeon, regularly licensed to practice your profession under the laws of the State of California, I believe?

A. Yes, sir.

Q. And you are now engaged in the practice of your profession here in Los Angeles?

A. Yes, sir.

Q. And you have been practicing medicine here in Los Angeles how long, Doctor?

A. Since 1922.

[fol. 1247] Q. And you are a graduate of what medical school, may I ask?

A. Indiana University, School of Medicine.

Q. And you graduated there when?

A. In 1907.

Q. And did you immediately enter upon the practice of your profession after graduating?

A. Yes, as an intern.

Q. And have you pursued any post-graduate work?

A. Yes, sir.

Q. What post-graduate work have you done?

A. Graduated in surgery at the Washington Post-Graduate Surgical School——

Q. And you——

The Court: Just a minute. The witness had not finished his answer.

Mr. Clark: I beg your pardon.

A. And I was on the staff of the Government Hospital for the Insane, at Washington, D. C., with William A. White. I received, as a junior medical officer there, I received instructions in the course of my daily work. I took the course of instructions three times at that school; did some post-graduate work in London, and in Vienna.

Q. The work that you did at the Washington school, under the direction of Dr. White, was rather a specialized work, was it not, Doctor, dealing with insanity and mental diseases?

[fol. 1248] A. Dealing with insanity and mental diseases, nervous diseases, and study of postmortems, and doing

postmortems, and laboratory work, in connection with the insane, and with those nervously diseased.

Q. And the Dr. William A. White, whom you mentioned as being at the head of that institution, is recognized by the medical profession as one of the great American psychiatrists, I believe?

A. Yes, that is true.

Q. Now, have you since your graduation specialized in any particular branch of medicine?

A. Yes, sir.

Q. What speciality have you pursued?

A. Mental and nervous diseases.

Q. And when did you begin specializing in that branch of medical science?

A. I began following my internship, a short while at the Logansport State Hospital for the Insane. Then I was sent to Marengo Hospital, at Cairo, Illinois, and to Indiana, Evansville. I stayed at these institutions somewhat over a year, and I don't know exactly how long. Then I went to the Government Hospital for the Insane, and stayed there during the years 1909, 1910 and 1911, and from then on I specialized in mental and nervous diseases.

Q. So that it would be an accurate statement if I would say that in addition to the work that you had in the various [fol. 1249] institutions that you have mentioned, that you have spent approximately 25 or 26 years practicing your speciality while you were maintaining your office, is that about correct?

A. That is approximately correct.

Q. You have been a member of the Lunacy Commission of this County at various times, have you not?

A. Yes, sir, I am a member now.

Q. And are now. And you have delivered lectures on nervous and mental diseases in various institutions of learning, I believe?

A. Yes, sir.

Q. Are you on the faculty of any of the universities at this time, Doctor?

A. I am on the faculty of Loyola University.

Q. Now, Doctor, you were appointed by the Honorable Thomas Ambrose, one of the Superior Judges in this County, to make an examination of this defendant, I believe, were you not?

A. Yes, sir.

Q. You have been employed to examine him in your capacity—under your appointment by Judge Ambrose?

A. Yes.

Q. And you have at no time had any consultations, or conferences with any counsel for the defendant?

A. No, sir.

[fol. 1250] And you don't know what we are going to ask you now?

A. Sir?

Q. You do not know what we are going to ask you now? It has not been the subject of any conference between us?

A. No.

Q. And you were not promised any compensation for any testimony that you may give here?

A. No, but I expect a little.

Q. But I mean you have not been promised any by any one connected with the defense?

A. No.

Q. Now, did you make an examination of this defendant upon one, or more than one occasion?

A. Yes, sir, I examined him on May 13th, May 23rd, and observed him in the courtroom, in Judge Vickers' courtroom, in the previous trial, and observed him for a little while in the jail playing cards with prisoners.

Q. Now, referring to the examination on May 13th, how much time did you spend in making that examination?

A. I would say approximately an hour.

Q. I wanted to defer for a moment, Doctor. Is there such a thing as a test for testing the mentality of individuals——

A. Well, there are approximately 30.

Q. What are some of the names?

A. The Simon-Binet Test, the straight test that is from France, the Elizabeth Town revision of that test, the Termin [fols. 1251-1252] revision of that test, the Alfa test, the Beta test, the Ebbing House test, the Zichn tests——

Q. I think perhaps that will be sufficient for our purposes, Doctor.

A. Yes.

Q. Let me ask you: did you make use of any of these tests in your examination of this defendant?

A. Yes, I made use of parts of all of them.

Q. You say parts of all?

A. Yes, sir.

Q. You didn't pursue any one test, that is what you mean?

A. Yes, I pursued two tests throughly in addition to those that I have already mentioned.

* * * * * * *

[fol. 1253] By Mr. Clark:

Q. Now, Doctor, laying aside any questions of insanity, which I understand is not involved here——

A. What?

Q. —did you form any opinion—I beg your pardon. I said, laying aside any question of insanity, for that is not involved here, did you form any opinion as the result of your examination of this defendant, as to his mental development?

Mr. Williams: Just a moment. If your Honor please, that question is objected to on the ground that it excludes the one factor for which such testimony, in our judgment, is admissible at this time. In other words, as I understand the matter before this Court, it is at the present time a matter of determining, among other things, whether this defendant had the mentality sufficient to make a confession, or make admissions, in other words, whether he could understand what was being said to him, and could understand, in turn, what he was saying, and that, to my way of thinking, must involve, so far as this witness is concerned, only the question of whether he was a person of sound or un-[fol. 1254] sound mind, whether he was inflicted with insanity, or not inflicted with insanity. And the fact, if it be a fact, that this witness may have opinions as to neurosis in this individual, or anything else, is not of moment in this case. The question is did this individual at the time he made a confession, or made admissions, if he did make such, did he have sufficient mental capacity to know what he was doing, and to understand the questions that were being asked him, and to understand the answers which he was giving, and unless that be the purpose for which it is being offered, it seems to me it is not admissible in this court.

The Court: I haven't any feeling of doubt but what the evidence is offered as part of the voir dire of the tendered extra-judicial declarations of the defendant. I don't think

the examination would necessarily be limited to the question of psychosis. There might be (I am making no comment as to whether there is, of course) a question of mental capacity, irrespective of psychosis. I am inclined to believe that the question last asked went to the latter classification.

Mr. Clark: Yes, your Honor.

Mr. Williams: It may be that I am in error. I thought it would be limited to the question of his mental capacity.

The Court: That is true, but mental capacity, mental horsepower, may be depreciated without there being a psychosis. The Court will take judicial notice of that, and [fols. 1255-1266] still it might be something which might not be ascertainable by a casual view, but might be determined by a person skilled in that line. Do you have the question in mind, Doctor?

A. I would like to have it again.

The Court: Please read it.

(Question read by the reporter.)

A. Yes, sir.

By Mr. Clark:

Q. What opinion did you form?

A. I formed an opinion that he was a dull, average individual. By that, I mean he had the mentality of the average dull adult individual, and was not within the borders of feeble-mindedness nor moranic.

* * * * * * *

[fol. 1267] Mr. Clark:

Q. Doctor, is there a form of mental disease known as dementia praecox?

A. Yes, sir, there is.

Q. And will you tell us whether that is a form of disease which comes on suddenly or whether it approaches gradual, over a considerable period of time.

A. In most instances it comes on quite gradually.

[fol. 1268] Q. And will you tell us some of the symptoms that are usually manifested in its approach?

A. Lack of interest in life in general, lack of interest in specific interests, education, occupation, clothing, deportment and the manifestation of the emotions which are common to the members of the human race, seclusiveness,

reclusiveness, withdrawal from society, withdrawal from the usual interests of life, day dreaming. Those are the important premonitory symptoms which precede the development of the acute mental disease.

Q. Doctor, I am going to ask you if you will just keep out of your mind any examination of any individual you have ever made, and basing your opinion upon the facts that are assumed in my question, answer the following question: I want you to assume the case of a boy, a member of a family of five children reared in extreme poverty in one of the southern states. Assume his father was a man of wandering or roving disposition, who would go away upon trips, sometimes starting away, going a mile or so and coming back and sometimes going away and staying two or three weeks, sometimes staying two or three years, and finally leaving his family altogether. I want you to assume also that this same father was a man of violent temper becoming extremely angry with his children and punishing them with great severity. As to the individual in question I want you to assume that he complained of severe headaches from his earliest childhood down to the period of middle life. When I say "the indi- [fol. 1269] vidual" I mean the son I am referring to, not the father.

[fol. 1270] I want you to assume that this son, for some reason, went to school for only a few months; that he began working in the cotton mills at about the age of 9 or 10 years; that during his boyhood he manifested a roving, wandering disposition, and after reaching manhood came and went with considerable irregularity. I would like for you to assume that in addition to the father, one of whose children expresses an opinion that the father was insane, that there was another distant relative who was insane, committed to an asylum, and that at least two other distant relatives, who were cousins, I believe, were feeble-minded. I want you to assume, in regard to this individual, the son of the father whom I described, that from his earliest childhood he seemed to have a defective memory; that he consorted largely by himself; that he didn't act as the other children acted, and to a considerable extent didn't enter into their games and amusements. I want you to assume that he was born at such a time as would make him about 45 years old at present. I want you to assume that the headaches of which I spoke continued

with greater or less frequency during his entire life; that during the year 1932, and in the fall of the year, his wife was found drowned in a bath tub; that during the January following his mother died, and he attended her funeral; that at a date of which I am not advised, but which I understand is not far from then, a nephew of his died, and I believe he accompanied the body to the home in Alabama. I want you to assume that during the year 1933 [fols. 1271-1272] this individual lived with a married sister; that he seemed restless and unable to sleep at night; that he was seen up walking around at late hours of the night; that he usually went to sleep in the morning, and did most of his sleeping during the morning hours; that he appeared nervous and irritable; that he had an apparent feeling or terror of the unlighted house, insisted that the lights be turned on at all times, and that on one occasion when he believed one of his nieces turned the lights off, he became violently angry with her, struck her; that thereafter he was reprimanded by his sister; that he burst out crying, and threatened to shoot himself; that during his entire life, from boyhood, he seemed egotistical, and undependable. Assuming those facts to be true, do you have any opinion, based upon them, as to whether he was or was not, during the year 1933, to which year the last few assumptions related, in entire possession of his faculties, in possession of sound mental faculties?

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[fol. 1273] Mr. Clark: I thought about that. Well, what I am trying to get at, Doctor, forming these hypothetical questions with some difficulty, upon those assumptions, have you any opinion as to whether that man was or was not—may I withdraw that? Upon those assumptions I will ask you whether you are of the opinion that the man is or is not mentally deficient?

A. I have an opinion, yes.

Q. What is that opinion?

A. That he is not mentally deficient.

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Cross-examination.

By Mr. Williams:

Q. Doctor, what examination of the defendant in this case did you make?

A. Well, I made a mental examination. First I made an historical examination, as given by the man himself. Following the historical examination, I made a physical examination, and following the physical examination—that is, the heart, lungs, kidneys, skin and bones, and facial muscles, and muscles of the body generally, genito-urinary organs, and the general stature of the man I examined, and [fol. 1274] he was a fine specimen, and following that I made a neurological examination, the cranial nerves, and the nerves that have to do with smiling, eating, smiling movements of facial muscles, and speech, and movements of the eye balls, and movements of the pupils of the eyes. Then the movement of the body muscles generally, to see whether the muscles were coordinated in their action, and whether the voluntary muscles of the body were under control of the will, and whether there were any evidences of any organic diseases of the brain or spinal cord, which would affect the condition of these 12 nerves that come from the brain, or the function of the nerves, that would lead to the condition and the overgrowth of the body muscles, and whether there was any impairment of speech which might indicate a defective brain. In other words, I examined the whole nervous system to see if it would function properly.

Following that I made an examination of the mental status of the individual, to determine the state of his consciousness, that is, to learn whether or not his consciousness was normal, clear or cloudy, or whether it was absent, whether it was delirious, or whether it was lethargic, or whether the nerve was in such a state that he did not understand the stimulae coming from the outside world.

Then I made an examination as to whether the individual recognized speech, and made tests of him, and from responses made by him, in response to certain requests, as [fol. 1275] to whether his sensation was working properly, and made notes as to whether the sensations were properly grouped, so that there was a proper conception taking place in the individual's mind, whether he put one perception with another perception, to form ideas to enable him to understand what was said to him, and to enable him to understand the environment in which he was in.

Next I made an examination to acquire if he was acclimated to time, place and person, and he was conscious of me, knew the time of the day, the month and year,

and whether he was conscious of fact, and of the fact that he was in jail in Los Angeles, and in the United States, and that I was in the room with him.

And then I observed whether, in answer to my questions as to whether his speech was coherent, relevant and responsive to the point addressed to him, to find out whether or not he was building his thoughts normally, and placing them in such a way as to make them understandable.

I then inquired of the man to get his final opinion of what he thought of his own mental status, that is, to learn whether he had any insight, or understanding of his own mental status, as to whether it was an insane mental status that he had, or a sane one, or an abnormal one.

And then I asked him questions which would lead me to form an opinion as to whether he entertained a belief which was delusional, that his ideas were entirely wrong, [fol. 1276] which were not founded on fact, and which were retained, in spite of the fact that I might say that those ideas were incorrect. And I examined him as to whether he heard things, and saw things, or felt impressions that were contrary to fact.

And then I gave him simple problems, to learn further about all these things that I just previously talked about. I had him do simple problems in arithmetic, mathematical problems such as adding 8 and 8, and 9 and 9, and 4 and 4, and 10 and 10, and 5 and 5, and I gave him a concrete problem and asked him how many cocktails he could get for a quarter. I then gave him certain tests which involved the process of perception, and the grouping of ideas, and the comparing of ideas, and I asked him to tell me the difference in one's walk, and if he knew the difference between a fly and a butterfly, and to find out if he knew what caused a fly or a butterfly, and in so recognizing those two insects if he was thinking properly. I asked him to tell me the difference between the cow and the pig, the difference between the dwarf and a child. I gave him some psychological problems, a number of them. I asked him to form sentences with words. Then I asked him questions which involved the understanding of moral relationship of life. Then I inquired about his general fund of information, to learn if his memory was working, or not, whether he had a memory for remote events, the events that occurred in his past life, if he had memory for events that [fol. 1277] were occurring now, and recently occurred

events, or whether he had a memory of events that were occurring at the time of the examination.

And in regard to his schooling, whether it was conventional, or unconventional, in the experience of the school of life. And whether or not he had conducted a successful business, and had been able to earn money, and to sustain himself in the place in which he had lived, and whether he had adjusted himself to his life in the community, and had been self-supporting. I asked him for a single memory test. I gave him a number to remember, and asked him to remember that number, and after five minutes he recalled the number that I had asked him to remember.

I talked to him about the illnesses, and asked him about his complaints, and the diseases from which he had suffered, and whether he was suffering at the time of the examination. At that first examination he seemed to be in pain due to the effect of a spinal puncture previous to my visit. So I asked some questions on the mental examination, which took in all the mental operations of his mental life.

Q. Doctor, did you find as the result of your physical examination—what result did you find?

A. Well, I found that he was in a fair state of physical health. There was no abnormal indication of depression of the skull. There was nothing in the examination of the [fol. 1278] head which indicated any serious injury to the skull. The respiratory rate was 18, and there was no abnormal breathing sounds. I listened to his heart, and looked at the fingernails, and toenails, and ankles, and observed no difficulties such as might be found in tests of the heart or blood vessels.

Then I looked for paralysis, the loss of function of the facial muscles, the muscles of the face, and arm and leg, whether or not he could use them.

Q. What did you find in regard to that?

A. I found that there was no evidence of any paralysis of the muscles, the voluntary muscles of any portion of the body, and that his muscles were normal, under the control of the individual.

I looked for evidences of infection of the central nervous system, that is, the brain and spinal cord, for a disease called syphilis, to see whether there was any evidence of this disease having gotten into the brain, or spinal cord,

and whether or not, if it had gotten in, whether it disordered the function of the brain or spinal cord.

Q. And what did you find, as the result of that?

A. I found that there was no evidence of any invasion of the brain, or spinal cord, or the nerves coming therefrom, being infected with syphilis; that there was no evidence of that sort of thing.

[fol. 1279] Q. Now, Doctor, before we leave it, you referred to a spinal puncture. What do you mean by that?

A. Well, an individual who has a brain disease, sometimes tumors, sometimes syphilis of the spinal cord, sometimes syphilis of the brain, sometimes tumor of the brain and various diseases of the brain, we find that if we examine the spinal fluid we find evidences in that fluid of the disease that is present.

Q. Now, what you mean in referring to the pain——

A. Excuse me——

Q. —was that he told you that he had the puncture made for the purpose of testing the spinal fluid?

A. Yes, sir.

Mr. Clark: What was the question?

(Question read by the reporter.)

By Mr. Williams:

Q. Well, now, with reference to these examinations——

A. May I say that I made a special inquiry as to the presence of pain after the puncture, because this general rule holds good: When an individual has syphilis of the brain or spinal cord, and a spinal puncture is taken, there is usually a little pain, but when an individual has a spinal puncture made, and the brain and spinal cord are free from syphilis, then we usually find great pain. Now, that is not always true, but that is a general truism, and I find it in practically 70 per cent of all cases of spinal puncture from [fol. 1280] my personal experience, and I cannot speak for other doctors, but that has been my personal experience.

Q. Now, these examinations that you made of the various reflexes that you have described heretofore were made for the purpose of determining whether there was any evidence of any involvement of the brain, or of the central nervous system?

A. Yes, sir.

Q. And what was your opinion as to whether there was any involvement of the brain or the nervous system?

Mr. Clark: Just before that is answered—I am not going to object to that. I do not think it is cross-examination of the witness. But assuming that it is not proper cross-examination, it would be proper redirect, and I assume your Honor will not limit me when I take the witness again.

A. May I have the question?

(Question read by the reporter.)

A. The results of the examinations of the nervous system show that there was no involvement of the nervous system. That is, the brain and the spinal cord were not diseased.

By Mr. Williams:

Q. Now, the series of mental tests which you made were made for the purpose of determining whether the defendant was suffering from any mental diseases, as distinguished from nervous diseases?

A. It was made—yes, and also to find out whether he was suffering from any nervous conditions, and whether he [fol. 1281] was suffering from any state of mental involvement, any type of deviation from mental health, or whether there was any mental or nervous defectiveness.

Q. And what conclusions did you reach as a result of those examinations?

A. I reached a conclusion that he was not suffering from any condition of mental defectiveness, and that he was not suffering from any disease of nervous defectiveness, and that he was not suffering from any mental conditions due to the brain or spinal cord, or other portions of the body.

Q. Now, Doctor, when you asked him the questions which you did ask him, were his answers responsive to the questions which you asked?

A. Yes, they were. He didn't always answer the question directly, but the answer was responsive. Sometimes he answered "No", but he always answered responsively to the question.

Q. Did he appear to understand the questions which you asked him?

A. In my opinion he did.

Q. Was his language coherent?

A. His language was coherent, and relative to the point, and related to the question put to him.

Q. Now, what did you find as to his recollection of previous——

A. Well, I found two kinds of findings, first, a subjective [fol. 1282] finding, in which he said he was forgetful, and that his memory was pretty bad for the last two years, and that he had been inclined to be confused, and then, in direct opposition to that, opposite to that, rather, why he would find that he remembered that he served in the Marine Corps, and that he served at Quantico, Virginia, during the war, and that he had lived in Alabama, and had lived down South, and that he had married a number of times, and that he had some knowledge of some of his relatives, and he did remember the specific grammatical test which I gave to him, the common one.

Q. What was that?

A. I asked him to remember 365 Oxford Street, and then at the end of five minutes to recall the street number, which he did recall correctly.

Q. Did you form any opinion, Doctor, as to whether at the times when he claimed not to be remembering things, he was or was not malingering?

A. Well, I felt at times he was malingering about the answers to some of these questions, and at other times he may have been forgetful, and at other times he did not know, because of his limited memory, and certain things he could not remember because he had never learned them.

Q. Now, Doctor, on that subject of education, you differentiate the know of fact and intellectual capacity, do you not? That is to say, a person may be intelligent and [fol. 1283] not have much education?

A. Quite so.

Q. With reference to this particular individual, I think you have indicated that he told you that his education was very slight?

A. Yes.

Q. Did the examination which you made indicate that he had had small school learning?

A. Well, I felt that his education had been limited, so far as training is concerned, and on the other hand that he had acquired a good bit of education, that kind of educa-

tion that enables an individual to live in the community in which he happens to be, and which to my mind is the most important purpose of education, and I felt that he had that kind of education.

Q. What did you learn from him as to what his ability had been to adapt himself, and maintain himself in the community in which he had lived?

A. Well, I had learned that he had conducted a barber shop down in the center of this City, down on 8th Street near Grand, and that he had gotten along there quite well, and that he had made a living doing that, waiting upon the citizens of the City, taking care of them, and shaving them, and doing the things in the barber shop, and that he had done that and earned money. In other words, he proved to me that he had the achievement capacity. I asked him [fol. 1284] about Grant and Washington, or rather Washington and Grant, these individuals having been presidents of the United States.

Mr. Williams: If your Honor please, I observe that it is about 3:30, and I don't know whether there will be any more questions of Dr. Bowers, but may we have the recess at this time?

The Court: Yes, we will take the recess at this time.

Mr. Williams: I will see if there is anything more during the recess.

The Court: We will take the afternoon recess, and you will remember the admonition heretofore given.

(Recess.)

Mr. Williams: I had one or two more questions. Shall I proceed, your Honor?

The Court: Yes, you may proceed.

By Mr. Williams:

Q. Doctor, you spoke of a physical examination. Did you observe whether the defendant had or had not a hernia at the time you examined him on the 13th of May?

A. Yes, sir.

Q. And did you make an examination of that, of the portion of the body where the hernia shows?

Mr. Clark: Of course, that is not cross-examination. I assume counsel is making him his witness for that purpose?

The Court: Surely.

Mr. Williams: He was asked on direct examination as to [fol. 1285] whether he made a physical examination of him.

Mr. Clark: Did I ask him whether he made a physical examination?

The Court: You asked him whether he made an examination of the defendant. That leaves it wide open.

(Question read by the reporter.)

A. Yes. It was not a minute examination, but I noticed he did have an inguinal hernia on one side. I believe it was the right. I don't remember which side, but he had an inguinal hernia.

By Mr. Williams:

Q. Did you form an opinion from your examination of the hernia as to whether it was of recent or old origin?

A. From the casual observation and examination it would indicate to me it was an old hernia.

Q. Now, Doctor, would you be able to form an opinion as to whether that hernia was a hernia which occurred as the result of an accident, or violence, or any of the other things which cause hernia, as late as the 19th, 20th or 21st days of April, 1936?

A. I didn't have any idea about any date. I noticed it was a hernia, and in my opinion it was just an old hernia, no evidence of any recent occurrence.

Q. Would you call a period from the 19th of April to the 13th of May a matter of recent occurrence?

A. Yes, that would be a recent occurrence.

[fols. 1286-1296] Q. Did you form an opinion, as the result of your entire examination, as to whether the defendant was sane or insane on the 2nd and 3rd days of May, 1936?

A. Yes, sir.

Q. What is that opinion?

A. He was not insane.

* * * * * * *

[fol. 1297] Doctor Charles Decker, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Charles Decker.

Direct examination.

By Mr. Williams:

Q. What is your occupation, sir?

A. Physician and surgeon.

Q. Are you licensed to practice as such in the State of California?

A. I am.

Q. And you do practice your profession in this state?

A. For 30 years.

Q. Did you, at my request a few days ago, make an [fol. 1298] examination of the stereos I guess you call them, stereos or any X-ray pictures which had been introduced into evidence in this case? I think they are exhibits 60 and 61?

A. I did.

Q. And did you also at that time make an examination of the report of the hospital at which Mary James was confined in the months of October and September, 1932, that is the doctor's notes and reports?

A. I thought the patient's name was Nona James.

Q. Winona, yes.

A. I did.

Q. By what method did you examine these X-ray pictures?

A. I examined them on a stereoscopic light stand for study of pictures by means of a stereo.

Q. Is that a stand which is specially designed for the purpose of studying X-ray pictures?

A. It is.

Q. Upon your examination were you able to determine the character and nature and extent of the bone injury which appeared in the skull of Winona James?

Mr. Clark: Just answer that directly, Doctor, please.

A. Yes.

Mr. Williams: Just describe what you determined as to the character of injury to the bone as determined from the X-ray pictures.

Mr. Clark: That is objected to upon the ground that it [fol. 1299] is irrelevant and incompetent.

The Court: Overruled. You may answer.

A. Exhibit 60 were pictures that were taken first a stereoscopic picture of the right side of the skull, that is the two views taken from different angles. It showed a fracture on the parietal bone on the right side of the skull. Perhaps I better point out the area in which the fracture occurred as it will be much plainer to understand.

Mr. Clark: All right, Doctor.

The Court: The ordinary shadow box wouldn't help, would it?

A. It might help, but I can point it out here on this skull.

The Court: For the purpose of the record, let the record show that Doctor Decker has produced a human skull for the purpose of illustrating the answer.

Mr. Clark: We are reserving our general objection to all this line of the evidence.

The Court: The record may so show.

Mr. Clark: And we are further objecting to the skull on the ground that it is unnecessary, that it tends to excite the passions and prejudice of the jurors and is of course, incompetent.

The Court: The objection will be overruled.

Mr. Williams: Doctor, using that skull, that you have there, will you point out at the same time as you state the positions of the fractures as you determined their position from your examination of the stereoscopes?

[fol. 1300] Mr. Clark: That is objected to upon the ground that it is incompetent, irrelevant and immaterial. It is really the same general objection that we have made to all evidence concerning the death of that wife and the transactions, events and occurrences in Colorado.

The Court: Objection overruled. You may answer.

A. The pictures marked Exhibit 60, show a fracture of the right parietal bone and near the lower margin and the squamous portion of the right temporal bone at its upper margin, with what we call comminution, that is a fracture in which there are many fragments. There were some open spaces along the line that joins these two bones together there, showing that the bone was broken and shoved out of the way or that the bone was so badly broken that parts of it were lost, irregular lines of frac-

ture extended upward from this center area on the right side up towards the top of the head.

Mr. Clark: We can't see the doctor's illustration at all.
The Court: Suppose you step over there, Mr. Clark?

A. From the center where most of the fracture appeared lines extended upward over this right parietal bone up towards the top of the skull and downward over the squamous portion of the temporal bone, down through the deep solid portion of the bone which we call the petrous portion of the temporal bone. The pictures that were taken about eight days later, if I recall, showed further fracture. The portion of the bone at the outer angle of [fol. 1301] the orbit is called the frontal portion of the malar bone. It is very dense. It is triangular and it will stand a great deal of force before breaking. This was broken and shoved forward. This was apparent in the right stereo pictures taken, I think it was, October 3rd.

Q. Those are the ones contained in People's Exhibit No. 61?

A. 61. 61 also contained a front view of the skull, stereoscopic, taken from the two angles, and that showed the fractures on the side with some depression, that is the bone was shoved in a little toward the center and this fracture on the orbit or on the bone at the outer angle of the orbit was very plainly indicated, showing considerable separation of bone at that point.

Q. And now, Doctor, in connection with your examination of these stereo pictures did you also make an examination of the reports of the doctors and nurses there at the hospital which were in the exhibits which were turned over to you? I think that was 58 or 59.

The Court: The hospital records were 58.

A. I read that report.

Mr. Clark: That is objected to on the ground it is immaterial that he made any such examination or not.
The Court: I didn't catch the full objection.
Mr. Clark: Immaterial.
The Court: Overruled.
[fol. 1302] A. I did examine the hospital records.

By Mr. Williams:

Q. And basing your opinion upon the examination of the stereoscopes and what you learned from the examination of the hospital records, did you form any opinion as to the type of force which caused the fractures which you found to exist in the skull?

Mr. Clark: Just one moment. While that question may be preliminary, as a matter of precaution for fear the witness may not answer categorically, I object to it upon the ground that it is immaterial. I will say to your Honor I think there will be no harm in overruling that objection if the witness is instructed to answer categorically, "yes" or "no".

The Court: You may answer that question "yes" or "no", Doctor.

A. Yes.

By Mr. Williams:

Q. What in your opinion was the type of force which caused the fractures which were found in the skull?

Mr. Clark: That is objected to upon the ground that it is hearsay and incompetent.

The Court: The objection will be overruled.

A. I formed my opinion as to the kind of force from the condition of the skull as shown by the X-ray pictures. The first picture shows fracture of the bones of the side of the head with some displacement of fragments. The pictures taken later from the front, showed that these fragments on the side were driven in a short distance and the picture [fol. 1303] of the fracture at the outer angle of the orbit showed that this bone was driven forward. In other words, the force was applied from one direction toward the side of the head, and force in another plane broke the bone here and drove it forward. In other words, there was more than one force applied.

Q. Now, did you form any opinion as to whether that force was the result of the body having been thrown against an object or whether something had come in contact with it in another angle?

Mr. Clark: That is objected to upon the grounds last stated and upon the additional ground that it is not a proper subject for expert opinion.

The Court: I think there is another objection that might be tenable, and that is that it doesn't appear from the examination of the X-rays whether the head had come in contact with an object or whether an object had come in contact with the head. I have some doubt as to whether that would be a medical opinion or a lay opinion. Does medical science solve that problem, Doctor?

A. It is very positive medical evidence.

By the Court:

Q. What I am trying to get at, Doctor Decker, is this: If you found a skull fracture—Well, let's take this particular case, would it be possible to tell whether they were caused by the head coming in contact with a stationary object and differentiate that from a moving object coming [fol. 1304] in contact with the skull, the skull being stationary?

A. There is a possibility of differentiating between the body being thrown violently and causing fracture of the skull and other manner of fracture. It is evidence in the picture and can be demonstrated.

Mr. Clark: I think it is not competent for the witness to pass upon his own qualification. I maintain it is not a question of expert testimony.

The Court: I was not trying to qualify the doctor. I was trying to find from the doctor whether there was medical science which would prove the matter.

Mr. Clark: It is a matter of physics, I think, purely and simply, not surgery at all.

A. Surgery is application of physics.

Mr. Clark: To a very great extent I recognize that as being the fact, Doctor, nevertheless I think this is a fact which any layman in knowing the laws of physics is just as competent to decide as a medical witness, and therefore, the medical witness cannot furnish the jury any particular enlightenment on the particular subject. That is what I tried to make apparent when I objected on the ground it was not a subject of expert opinion. It is an application of one of the universal laws which we are all just as competent to make as the witness is.

The Court: We recognize that a physician may testify as to whether a particular injury was produced, for ex-

[fol. 1305] ample, by a sharp instrument or by a blunt instrument. We know that some of those injuries which would appear to the layman to be an injury caused by a sharp instrument, experience and special knowledge would show to have been caused, not by a sharp instrument, but by an instrument with a square edge. I think you better reframe the question, Mr. Williams.

By Mr. Williams:

Q. Were there any evidences which enabled you as a surgeon and doctor to determine as to the fractures which you found on the skull which is under discussion, the manner in which those fractures were caused, as to whether the fractures were caused as a result of the body of the person being thrown against an object or by some object coming in contact with the skull in another manner?

Mr. Clark: That is objected to upon the ground that the evidence is incompetent, that the subject is not a subject of expert medical opinion, but a mere application of the laws of physics which jurors are as competent to apply as the witness and that no foundation has been laid for such evidence.

The Court: The objection will be overruled.

A. There was evidence that enabled me to make a determination regarding that.

By Mr. Williams:

Q. Now, state what the evidence was.

Mr. Clark: That is objected to upon all of the grounds stated last.

The Court: Same ruling, objection overruled. You may answer.

[fol. 1306] A. The fracture upon the side of the head of the two bones showed many small pieces. The fracture of the malar bone at the outer angle of the eye showed this piece driven forward. These were driven inward; this was driven forward, by reason of that I know that two forces were applied, one striking the side of the head and the other striking this bone and driving it forward to cause that forward displacement. If the fracture of the

head had occurred from the body being hurled against some hard object——

The Court: Pardon me, Doctor. I am inclined to think in view of the testimony given thus far, that the objection might be well taken. I think we have gone far enough.

Mr. Williams:

Q. Did you form an opinion as to the type——

Mr. Clark: Just one moment; before counsel states his next question I wish to move the Court to strike out the portion of the answer given upon all the grounds stated in the objection.

The Court: I am wholly uncertain as to what portion you asked to have stricken, Mr. Clark.

Mr. Clark: Then, if your Honor please, may I defer the motion until tomorrow morning when I have the transcript before me?

The Court: Certainly you may have that right. I thought I stopped the doctor before he had gone into the portion that was not admissible, but maybe I didn't. You may proceed.

By Mr. Williams:

Q. Did you form an opinion as to the type of instru- [fol. 1307] mentality which could have caused the fractures that you found to exist?

Mr. Clark: That question, your Honor, is objected to upon the ground that it is incompetent and immaterial. It is precisely the character of question that was asked in a condemnation suit about the uses to which a parcel of land could be put and as to which class of questions Judge Shaw in his opinion said that it was analogous to the famous question "If you had a brother, would he like cheese."

The Court: The objection will be overruled. I think it becomes within the rule that testimony may be received as to the nature of the instrumentality which might have caused an injury of the character displayed to the witness.

Mr. Williams: The question was, could you form an opinion from your examination?

A. I could.

Q. What, in your opinion was the type of instrumentality or instrument which could have caused the fractures which you found?

Mr. Clark: That is objected to upon the ground that the evidence is incompetent, the entire subject matter is irrelevant, that the inquiry is not a proper subject of expert testimony, that it calls for an opinion which the witness is not shown to be competent to express.
[fol. 1308] The Court: The objection is overruled.

A. A blunt instrument of moderate weight could have caused the type of injuries exhibited on the side of the head, and on the malar bone.

Mr. Williams: You may cross-examine.

Cross-examination.

By Mr. Clark:

Q. If you will pardon me, Doctor. The injury on the side of the head might have been caused by a blow of an iron object, with some degree of force, might it not?
A. It could.
Q. It might have been caused by a blow with a rock?
A. It could.
Q. It might have been caused by any kind of an instrument that was projected against that portion that was hurt, and heavy, and projected against that portion that was hit with sufficient force?
A. Not a heavy instrument, because the blows indicated a force from some moderately light hard instrument.
Q. What were the conditions upon which you based the conclusion that it was a light instrument?
A. The bone was broken in many pieces, indicating a rather violent fracture.
Q. Yes.
A. The brain substance, according to the hospital record, [fol. 1309] did not exude through the bone, and the brain substance would have protruded.
Q. Then in reaching the conclusion which you did reach, you took into consideration not only the skull, as I understand, but also the hospital records?
A. Yes.

Q. I am not clear whether any witness has testified to facts embodied in the report.

The Court: The hospital records were offered and received in evidence. There was no affirmative, independent testimony by the witnesses as to having themselves observed the matters contained in the hospital records.

Mr. Clark: I shall object at this time that this witness was not present, and I now move to strike the testimony of the witness out upon the ground that his opinion is based upon hearsay, being based upon statements made in the hospital record by some witness who was not produced, and who was not sworn, and whom we had no opportunity to cross-examine. I respectfully submit to your Honor that that opportunity to cross-examine is essential as to every fact that comes into the case, only in those instances where the Court receives some documental record required by law to be kept, being of a prima facie character. This information of the Doctor is based upon hearsay, and the information therefore, is incompetent.

Mr. Barnes: I think that counsel is at a slight disad- [fol. 1310] vantage, your Honor. My recollection is that some one else handled that situation for the defense. Mrs. Snyder was here and testified—my recollection is that after a portion of the foundation was laid, there was an agreement between counsel, shown on Pages 902 to 910 of the record——

Mr. Clark: I will admit that that must have been true——

Mr. Barnes: I think that is the purpose.

Mr. Clark:—and I have been careful in making my objection to keep that assumption before me. Assuming that we waived our right to object to those records being received, we did not waive our right to object to any use being made as the foundation of a formed opinion. We were just as free to pass our objection to the information or the opinion of the doctor founded upon this as if they had not been received in evidence.

The Court: Dr. Decker, was there anything that you considered in forming your last opinion that you stated, other than the one factor that there was no exuding of the brain substance?

A. A condition of the skull shown in the X-rays, your Honor——

The Court: I mean——

A. —would form the foundation of such a judgment.

The Court: Could you submit that without the record?

A. The hospital record was only supplemental, and confirmed the judgment that any one would form from the X-ray. Though without the record, the judgment would [fol. 1311] be rated, but the other was simply additional evidence.

Mr. Clark: With that explanation I agree that the motion is not well taken.

The Court: All right; you may proceed.

By Mr. Clark:

Q. Now, Doctor, suppose an object of moderate weight, an ordinary object of moderate weight, were stationary and hit the side of the head with a certain degree of force, brought into contact with it, that would fracture a skull?

A. It might, yes.

Q. And if the force was great enough?

A. Yes, sir.

Q. And it might give rise to the same—is this what you would call a comminuted fracture?

A. No, the weight of the body would be considered, and if the weight of the body was other than against it, the weight of the body would carry the pressure into the head.

Q. You mean that the whole weight of the body would give an impact greater than you believe was received in this case, is that right?

A. The follow through weight would have pressed the bones way deep into the brain tissue, instead of just being slightly depressed.

Q. Would not that depend upon how the body was pressed against it?

[fols. 1312-1313] A. The weight of the body has an effect on the blow.

Q. But if the weight of the body struck some intervening object, that would make some difference?

A. It would.

Q. And whether such a thing did occur in this case, you have no means of knowing?

A. Yes, sir.

Q. It would have been a possible thing?

A. It would have been possible for a body to have struck some other object before it struck the other object.

Q. And that would give this condition of fracture?

A. No, I don't think so.

Q. What kind of a fracture do you think that would bring about?

A. A fracture with many particles, many broken pieces, that indicated a very sharp force; in other words, it was a sharp blow that broke the bone into small pieces.

Q. Suppose the blow was by contact with a hard instrument upon the head, being jerked on it by the neck, the remainder of the head being stationary, would you have a fracture then?

A. I seriously question whether you would have a fracture.

Q. You don't think the head could be brought against the rock with sufficient force to fracture the skull?

A. Not in the manner that that was fractured.

* * * * * * *

[fol. 1314] Dr. Charles Decker, resumed the stand and testified as follows:

Cross-Examination.

By Mr. Clark:

Q. Doctor Decker, taking your skull for a moment, let me ask you if it is not true that there is a percentage of people who have what is sometimes termed paper skulls, that is skulls, the bone of which are exceedingly thin?

A. I never heard the term paper skull used. It is a fact that skulls vary in thickness.

Q. It is a fact that about two per cent of human beings have one or more of the occipital parts of the skull exceedingly thin?

A. I don't think that is quite correct. They do vary. Negroes have very dense skulls and Caucasians much thinner ones.

Q. Diverting from that for a moment you, in expressing the opinion which you have expressed, you assumed a blow struck on the skull with a certain amount of force, did you not?

[fol. 1315] A. I did.

Q. What amount of force did you assume that blow was struck with?

A. It could not be measured in pounds, but from the fragments of the skull, the number of cracks and the number of pieces of bone, I would say that it was a moderately light blunt instrument driven rapidly against the head to make the fractures on the side, and forward to drive the bone at the corner of the eye out of place, breaking it and driving it forward.

Q. Yes, Doctor, you have told us that three or four times before, but I am not asking you that; what I am trying to get at now is not the size of the instrument or the weight of the instrument, but the amount of physical force which you assumed was used in delivering the particular blow which you think was struck.

The Court: Do I understand, Mr. Clark, so that I may be able to rule if the question arise later on, that you are assuming that the blow was struck by some person using physical force?

Mr. Clark: That is the assumption that the doctor made. I am only following him.

The Court: I want to have this clear before we go further. Doctor, did you start out with the assumption that somebody had struck a blow, or did you take the evidence that you had at your disposal, analyze it, and arrive at a conclusion as to what had caused the injury?

[fol. 1316] A. I only reasoned from the damage to the skull that some moderately light, hard, blunt object had come in contact with it, travelling at a relatively high rate of speed, in order to make the fracture.

The Court: In other words, you started with your premises as the physical facts disclosed by the stereoscopic X-ray pictures?

A. I did.

Q. And drew your conclusions from them?

A. I did. I have had no evidence placed before me as to what caused the injury.

By the Court:

Q. You don't know, and you are not assuming any particular thing?

A. I am not assuming.

Mr. Clark: You are assuming however——

Mr. Williams: Mr. Clark, may I interrupt you long enough to say that one of the jurors is having difficulty seeing the skull, because you are standing between him and it.

Mr. Clark: That is the first time I ever knew that there was any juror that couldn't see through me.

Q. You did, assume, however, that some sort of instrument was used either by a striking blow or as a projectile, and brought into contact with the skull, isn't that right?

A. Yes, sir.

Q. And now, the result of such an impact so received [fol. 1317] would depend upon a number of factors, would it not, Doctor?

A. It would.

[fol. 1318] Q. One of the factors being the amount of force used in delivering the blow, or launching the projectile? That is correct, isn't it? That would be one of the factors?

A. Yes, broadly speaking, but to make it more exact, the velocity of the object, its weight and its shape.

Q. Now, in the first place, as to the velocity of the object, the X-rays afforded you no enlightenment, did they?

A. Yes.

Q Well, with the enlightenment that they did afford, what velocity were you able to ascertain?

A. I would not measure it in foot seconds, but I would say a relatively high velocity.

Q. Well, if you can't measure it in foot seconds, isn't there any more definite opinion you can express than relatively a high velocity?

A. Well, a rock hurled from a human hand could have such a velocity, or a hammer in a human hand could strike, and the head of the hammer could travel with a velocity that would be called relatively high velocity.

Q. And a number of other things could be projected against the skull, or strike the skull, couldn't they?

A. Yes, if small and high velocity, they would produce that.

Q. But as to the amount of muscular energy back of such a blow, or the amount of velocity with which such an object would travel, the X-rays furnish you no information what- [fol. 1319] ever, do they?

A. They would not furnish exact information.

Q. Now, another of the factors that has to be taken into consideration is the strength of the skull itself, isn't that true?

A. Correct.

Q. Now, am I correct in my understanding, Doctor, that the bones of the skull of an individual vary in chemical composition as the individual progresses from childhood to old age?

A. Yes, there is a change in the deposits of mineral salts.

Q. And there is also a change, as the chemical change takes place, the manner in which the bone heals to blows changes, does it not?

A. That is correct.

Q. The bones contain lime and phosphorous, do they not, Doctor?

A. They contain mineral salts in the hard bone, and in the childhood that you speak of it is more cartilaginous substance, less of the mineral salts.

Q. And the mineral salts are lime and phosphorous?

A. Yes, sir.

Q. And the relation between the two changes as the individual becomes older?

A. Yes.

[fol. 1320] Q. Now, also the bones contain a certain amount of cartilage, cartilaginous matter, do they not?

A. Some contain a small part, and parts are very dense.

Q. And the quantity of cartilage is greater in young children, and becomes less as the individual becomes older, that is true, isn't it?

A. Yes.

Q. And those changes, both the changes in the ratio of the mineral salts, and the proportion of the cartilage, make a difference as to whether strength is necessary to fracture or shatter bone?

A. Some difference, of course. A more fragile bone will break while the other will bend.

Q. Now, those X-ray pictures that you examined showed no ratio of salts in the skull of the individual?

A. Oh, yes. The size of the skull indicates it is an adult skull.

Q. And what size of skull did the X-ray show?

A. The density of the bone showed.

Q. What was the density of the bone?

A. In measuring it—it would be of an adult.

Q. That differs in the same adult at different times of life.

A. Well, it would be variant.

Q. And that variance is different in different individuals?

A. Yes, they increase in the thin skull, and sometimes in [fol. 1321] thick ones.

Q. What made you determine how thick the skull was?

A. You could see the thickness of the bone.

Mr. Clark: By the way, I wonder if we could see those X-rays?

Mr. Barnes: I think the Clerk has them.

The Court: Did you bring them back?

A. At 6:00 o'clock of the day they were received I turned them over to Captain Plummer, the head of the department.

Mr. Clark: Does that mean that they were taken back to Colorado, and are not available here?

Mr. Williams: I am sending a man downstairs to find out.

Mr. Clark: I understand that everything has been sent back to Colorado. I will proceed with some other branch of the cross-examination until they do arrive.

Q. Doctor, tell me, the use of X-rays is common amongst medical men for the purpose of diagnosis, is it not?

A. It is, for many conditions.

Q. And the trained eye, examining an X-ray picture, may see many things that untrained eyes may not recognize, that is true?

A. That is quite correct.

Q. In order to properly interpret an X-ray, a considerable degree of skill is necessary, isn't it?

A. Quite true.

[fol. 1322] Q. And that skill comes only from experience, isn't that true?

A. Very true.

Q. No amount of study alone can give the skill necessary to analyze X-rays?

A. You are correct.

Q. And it is also true, is it not, Doctor, that for an accurate interpretation of X-rays, special equipment is desirable, and sometimes necessary?

A. Correct.

Q. You may use a stereoscope, is that the idea?

A. Both the stereoscope, and what is called the shadow box.

Q. And the use of the stereoscope, as distinguished from the shadow box, is that the stereoscope more nearly gives the impression of three dimensions, isn't that correct?

A. Correct.

Q. Looking at an X-ray through the stereoscope, you use the instrument for the purpose of getting as nearly as possible the view that you would have if you were looking at the original solid matter, instead of the flat sheet, is that correct?

A. Yes, sir.

The Court: Might I suggest that the manner in which the X-ray is taken, whether taken stereoscopically, or not?

Mr. Clark: Yes. And might I inquire if there has been [fol. 1323] testimony here——

The Court: It is described as a "Stereo" X-ray.

Mr. Williams: I am now handing to counsel People's Exhibits 60 and 61.

By Mr. Clark:

Q. Now, we spoke of the shadow box a moment ago, Doctor. That is simply a frame arranged so that the X-rays may be placed in the frame, and the light thrown upon them?

A. Usually with a frosted glass, to diffuse and soften the light.

Q. One can, however, take an X-ray, hold it to the light like this, and make some interpretation in some cases?

A. If there are large lines that can be plainly seen.

Q. And you recognize the two X-ray plates that I have here as two of the plates from which you based your opinion, do you not?

A. I cannot see very well.

[fol. 1324] Mr. Clark: I am referring, Mr. Reporter, to People's Exhibit No. 60.

A. Yes, these are two that I studied. These are the ones that are marked 60, I believe.

Q. Yes. And you recognize them as being two of the X-ray plates that you studied?

A. Yes, sir.

Q. Now, I hold in my hand here—I don't know how to differentiate——

A. They are taken at a slightly different angle.

Q. Yes. Well, I am holding one now in which the body of the letter "R" more completely covers the portion of the skull than the "R" on the other one. Having that before us, I am going to ask you what there is, if anything, upon that particular picture that enables you to determine the density of the bone that was fractured in the skull to which the testimony relates.

A. The depth of the shadow, the contrast between the places. Here is black, where there is no intervening bone.

Q. Now, wait a minute. By "here" you are referring to the margin?

A. The margin.

Q. At the extreme right of the plate and outside of the figure of the skull?

A. Yes.

Q. It is necessary, Doctor, to show that in the record, [fol. 1325] so that if an appeal is taken the higher court may understand what the word "here" means.

A. Outside of the skull the blackness is evidence that the X-ray had nothing in between it and the plate.

Q. Yes.

A. Where the skull shows it is the thickness of the bone cutting off the X-ray from the photographic plate on the other side that brings out the image. The density of the bone is what indicates how much X-ray was cut off or how much reached the film, so we can tell about density of bone by the amount of contrast between the unobstructed part of the ray on the plate and that that goes through the bone.

Q. Now, let me ask you, taking the plate you hold in your hand, I notice some dark colored patches upon it. Are they the shadows to which you refer?

A. They are places where there is very little bone in between the plate and the X-ray tube.

Q. Now, one of such places where there is very little bone between the plate and the X-ray tube is where I am indicating with my finger, near the lower rear part of the skull, is that correct?

A. Yes, sir.

Q. Now, this other plate which I have here is another plate showing the same bone, is it not?

A. At a different angle.

Q. And when we put the two plates here together it becomes immediately apparent that the shadows are heavier

[fol. 1326] in the plate I didn't show you at first than in the plate that I first attracted your attention to, isn't that true?

A. The shadow of the bone is heavier, yes, a different angle.

Q. Which, according to the statement as I understood it, you made a moment ago, would indicate different density, is that right?

A. The light goes through a heavy portion of the occipital bone here and in this one the occipital bone, the light is at such an angle that it goes through the thinner part and the dense part of the bone is here.

Q. So that a heavier shadow may occur in one plate than will occur in another plate where the same bone of the same density taken under the same conditions is involved, isn't that true?

A. No, not at all. You are entirely mistaken. The difference in the two pictures is that one is taken at an angle.

Q. I didn't ask you about these two pictures; I was asking you about X-rays generally.

A. No, the same angle and the same force of electrical current through the tube, the same distance from the tube to the object on the bone would show the same density of the same bone taken in two different pictures.

Q. Yes, but if the current was different or if the object [fol. 1327] photographed was a different distance from the place you would have a different depth of shadow, wouldn't you?

A. You would have a larger bone if it was any greater distance and the more it is enlarged the denser the picture would appear.

Q. And now, you of course, were not present when any of those pictures were taken.

A. No, I was not present.

Q. In forming the opinion that you expressed in answer to Mr. Williams' questions, did you assume any particular strength of current was used in taking these X-rays?

A. No, I didn't assume that, because it is a matter of X-ray technique to use—I didn't know what tube they took that with. It might have been a Coolidge tube; it might have been some other, but probably it was a Coolidge tube because almost everybody uses a Coolidge tube now. It is a highly perfected tube.

Q. In other words, you don't know what tube was used, what distance the object was from the plate, you don't know the strength of the current used?

A. It is not necessary to know those things.

Q. Well, you don't know those things anyway?

A. No.

Q. Doctor, I don't mean to be impertinent, but I assume you studied your profession in some institution of learning?

A. Yes, I did.

[fol. 1328] Q. And may I ask when you graduated?

A. Medical Department of the University of Southern California.

Q. May I ask when?

A. 1906.

Q. During your student days X-ray work was not much taught in the university, was it, Doctor?

A. We began very intensive study of X-ray back in St. Louis University where I began my medical education.

Q. Then, you did pursue the systematic study of X-ray work before you were admitted to practice your profession, is that correct?

A. To a degree. I didn't specialize in X-ray at that time.

Q. It was just a part of your medical course, that is all I meant to imply?

A. Yes, sir.

Q. And I suppose you graduated sometime between 1907 and 1910?

A. No, 1906.

Q. 1906. I beg your pardon. That was the period of your graduation rather than your entry of the school?

A. Correct.

Q. And you engaged in the general practice of your profession after that, did you, or did you specialize?

A. General practice.

[fol. 1329] Q. Have you been engaged in the general practice of your profession ever since?

A. I have followed surgical specialty for a good many years.

Q. For about how many years have you practiced surgery as a specialty?

A. I haven't limited my practice exclusively to surgery, but have specialized in it for a matter of 15 or 20 years, 20 years I would say.

Q. Now, during the 15 or 20 years, we will say 20 years in which you specialized in surgery—I want to be perfectly fair with you—as I understand, yours was a general practice in which surgery was a major item to which you devoted more attention than to most of the general practice, is that correct?

A. That is correct.

Q. And during the period that you have been engaged in specializing in surgery have you specialized in some particular branch of surgery or has that been the general surgery practice?

A. General surgery.

Q. In the practice of general surgery you didn't have a very large number of cases involving skull fracture, did you, Doctor?

A. I have seen a great many.

Q. If you will pardon me, but that you have seen a great many, doesn't quite answer the question. You haven't personally had a great many surgical skull fractures to which you devoted professional attention, have you Doctor? [fol. 1330] A. I have seen a great many that were under my professional responsibility.

Q. Now, would we be safe in saying 40 or 50?

A. No, many more.

Q. Do you think as many as a couple of hundred?

A. Yes.

Q. Do you think that would be about a fair estimate?

A. Well, without going back for records in the army, where I had the hospital back of the Argonne, I couldn't tell you. We saw hundreds of cases of all kinds of fracture.

Q. Just tell me, Doctor, as nearly as you can, in how many of those fractures you had X-ray pictures taken at all.

A. All of them, I would say, all of them, because in a skull fracture we invariably resort to X-ray to determine the extent of bone damaged.

Q. In how many of those cases have you called in someone else to do the interpretation?

A. I have done my own interpretation.

Q. You have done your own interpretation all the time?

A. Yes, I was X-ray specialist for the Childrens Hospital some years ago.

Q. Coming back to your skull——

Mr. Williams: I take it, that when you refer to "his skull" you refer——

Mr. Clark: I refer to the one that he carries in his hands.

[fol. 1331] Q. Coming back to the skull, I understand that you found some fracture of the bone upon which I have now placed my finger?

A. Yes, sir.

Q. What bone do you call that, Doctor?

A. Malar.

Q. That is the upper jaw bone, isn't it, or part of it?

A. It forms the outer angle of the orbit.

Q. Of the orbit of the eye. And that is a comparatively thick bone, is it not?

A. Comparatively thin compared with other bones of the skeleton.

Q. Now, Doctor, before I go on to that, we have here a human skull, and I understand that in the live human being this is simply a bony case in which softer, more delicate organs are enclosed? Is that right?

A. Quite so.

Q. The principle of those organs being the brain?

A. Yes, sir.

Q. And one of the reasons for the dome shape skull is that a skull of such shape will withstand a heavier blow than if it were of other shape.

A. Quite so.

[fol. 1332] Q. In addition to that, as I understand, the portion of the skull where the brain is contains a fluid extending down into the spinal cord, that we sometimes speak of as the spinal fluid, is that right?

A. There is.

Q. The brain is suspended in that fluid?

A. There is a slight amount of fluid over the brain, under the meninges that line the skull.

Q. One of the functions performed by that fluid is to absorb the shock of blows or impact upon the skull before they reach the brain, that is true, isn't it?

A. It would be so thin on the side of the head that it wouldn't have much of a cushioning effect.

Q. At any rate, did it ever come to your attention as a medical man that an impact might be received upon one side of the head, and no fracture result there, but the bone upon the other side of the skull be fractured?

A. That is a well recognized principle.

Q. You call that reflex fracture?

A. Yes, sir, or contre-coup.

Q. And it isn't always even possible then, is it, Doctor, from the mere fact of a fractured bone, to tell where the impact was? You have to have other facts than that, sometimes, in order to know where the blow was struck?

A. The appearance of the bone would have to be taken into consideration to determine that, of course.

[fol. 1333] Q. Now, the bone of which we were speaking that forms part of the orbit, you call that the malar bone?

A. Yes, sir.

Q. That is quite flat and thin in places, isn't it?

A. Quite.

Q. It is a bone that is easily broken?

A. In some parts easily broken; in other parts, rather dense, and rather strong, because of its anatomical arrangement.

Q. Much more easily broken over the greater part of the surface than the bones of the skull proper, that is, the occipital, parietal and temporal bones, isn't that true?

A. Portions of the occipital bone are rather thick, and hard to break. Other portions are rather light. The same holds true of most all the bones of the skull.

Q. As a matter of fact, the densest part of the skull is the occipital bone, isn't it?

A. Around the opening for the spinal cord.

Q. By "the occipital bone", you mean the back of the head?

A. It forms the back and base of the skull.

Q. On the other hand, the temporal bones are sometimes quite thin, are they not?

A. The upper part of the temporal bone is usually thin.

Q. So that in considering the effect of a blow, we have to consider which one of the bones is involved, that is, when we know which bone is involved, we at once begin to get [fol. 1334] some idea on whether it is one of the heavier or lighter bones of the skull?

A. Yes.

Q. Now, referring again to the Exhibit 60, and again referring to the place which I showed you first, am I correct in my understanding that the darker portions which seem to lie above the mouth of the individual's skull are shadows?

A. The dark shadow here——

Q. That is what I refer to.

A. —is a cavity in the bone, called an antrum, and the shadow here——

Q. Referring to a lighter shadow pretty near the back of the eye?

A. Yes. That shows the thinness of bone, or the lack of bony structure there to obstruct the light going through here where the eyeball is.

Q. I am showing you now the second of those plates, rather than the first one.

A. Yes.

Q. Does that plate show where the fracture of this malar bone occurred?

A. The fracture of the malar bone doesn't show clearly in this picture.

Q. Does it show more clearly in the component picture?

A. No, it is in 61.

Q. Does it show more clearly in one of the plates of 61? [fol. 1335] A. Yes.

Q. This is Exhibit 61, which seems to consist of——

A. Three sets of pictures.

Q. —four——

A. There are six positives in there.

The Court: Dr. Decker, when a stereoscopic X-ray is taken, are there one or two films, or negatives made?

A. There are two films that are exposed in a stereoscopic picture, that is, they might have one large film, and have half of it covered, and expose one half, and then shift the plate holder and expose the other half.

The Court: The technique requires two negatives for that?

A. It is two negatives on one plate, or two separate negatives.

Mr. Clark: I think possibly the skull will illustrate better than the X-ray what I am trying to get at. Will you just place your finger on the portion of the malar bone which you found to be fractured?

A. There is a fracture just at this point.

Q. That is just below the suture?

A. Just below the inferior angle of the frontal, and this is the upper part, what we call the frontal portion of the malar.

Q. To what extent was that bone fractured?

A. It is broken across here, and driven forward, away from the suture line.

[fol. 1336] Q. Now, that would indicate that the skull came in contact with some matter giving impact from the rear, would it not?

A. It would. It might, from some object coming in contact with the skull from the rear. The converse is equally true.

Q. The frontal bone, itself, was that at all injured?

A. There doesn't appear to be fracture lines on the frontal bone; it is the parietal bone, the temporal bone, and this portion of the malar bone, which show the fractures in the X-rays which we have.

Q. Yes. Now, the parietal bone lies, if I may use the expression, somewhat above the temporal bone?

A. It is the bone that lies on the side.

Q. And you found the parietal and the temporal on the right side of the individual injured, is that correct?

A. Correct.

Q. Now, where would you say the greater area of fracture was? Would you say it was in the parietal or the temporal?

A. More in the parietal, and this portion of the temporal, this little flat portion here, and they show many pieces or fragments of bone. Right about at this suture line there are openings brought about by the impact of the object that contacted.

Q. Now, yesterday you spoke about the weight of the body in the case of the skull falling upon some heavy instrument. As a matter of fact, the weight of the body alone [fol. 1337] would not determine the force with which an impact in such case would be received, would it?

A. No. The density, and the weight, and the volume of the object, the speed with which it was traveling, would measure the kind and degree of damage that would be sustained.

Q. For example, if a person standing up were to fall in an epileptic faint, or a fit, the body would not strike a hard object underneath with as nearly great force as if a body were thrown off a cliff 50 or 60 feet?

A. That is very apparent.

Q. The law of falling objects would determine the velocity of the human body the same as any other falling object?

A. I think gravity affects them both.

Q. It would be a possible thing, would it not, for both fractures to have been brought about by the same instrument, however it may have come in contact with the skull?

A. Yes.

Q. And it would have been a possible thing for the two fractures to have been caused by different instrumentalities, would it?

A. Correct.

Q. And it would have been possible, would it not, for the malar bone to have been fractured by the skull being brought back against some hard object?

A. It could be fractured that way.

Q. Now, I think I have covered about all of the ground [fol. 1338] that I had intended to, Doctor, except possibly one or two questions. If your Honor please—is there going to be any redirect?

Mr. Williams: One or two questions.

Mr. Clark: If your Honor please, I don't want to delay the Doctor necessarily, but I might ask him to remain until after the Court adjourns, until after the recess. I have concluded my examination as far as I know now, but during the morning recess I may have three or four more questions to ask.

The Court: I think he might do that.

Mr. Williams: I have one or two questions, your Honor.

Redirect examination.

By Mr. Williams:

Q. Doctor, in your opinion, could the factors which you found in your examination of these X-rays be caused by a single blow?

Mr. Clark: Just one moment. I don't think that is redirect examination, but I think it is otherwise a proper question. I am not going to object on that ground. I was trying to think out loud, as to whether there was any ground that I was going to object upon besides the one.

The Court: You may answer.

A. Will you repeat the question, Mr. Person?

(Question read by the reporter.)

[fol. 1339] A. No.

By Mr. Williams:

Q. And what is your reason for that opinion?

Mr. Clark: That is—well, I won't object to that. Go ahead.

A. They show fractures that could only occur by different blows:

Mr. Clark: The witness has testified to that before.
The Court: That is my impression.

A. There is other evidence in the multiple fragments upon the side of the head.

By Mr. Williams:

Q. Now, you spoke of some kind of a fracture that Mr. Clark called a reflex fracture, and you had some other name?

The Court: Contre-coup.
Mr. Williams: What?

A. Contre-coup.

Q. Have you any opinion that any of these fractures could have been caused by such a blow as his Honor has just expressed, the word I cannot understand?

Mr. Clark: Mr. Williams, I don't make any contention that such words reflect on the opinion of the Doctor at all.

The Court: I think the question might be answered, because while the matter might be clear to counsel, it may not be to the jury.

A. The fractures that are shown in the X-rays are very [fol. 1340] evidently the result of particular violence to the side of the head on which they occurred.

By Mr. Williams:

Q. Doctor, you stated something of the experience you had had on the matter of bone structure, and X-ray studies. Will you state more fully what your experience in those lines has been?

A. Well, when I began my practice I was the X-ray specialist, doing all the X-ray work at a foreign hospital. When I was an intern in the hospital, I did all the work,

the X-ray work, at the hospital. At that time they didn't really do the X-ray work in the hospital. After that I was engaged in industrial surgery, and I produced one of the largest type of X-ray machine for my work there. And in my work there I produced the best that could be done. We had one hospital where I handled six wards of fracture cases.

Q. And during that period you examined a great many fractures of the skull, both by physical examination of the patient, and by examination of X-ray pictures that were taken?

A. I did.

Q. Did you diagnose the injuries, and determine the method, the best method, to operate on patients?

A. I did.

Mr. Williams: That is all.

The Court: Doctor, what was your position in the service [fol. 1341-1431] during the World War?

A. Well, I commanded a few hospitals, and then I was in charge of the Medical Corps.

The Court: The Medical Corps?

A. Yes, and I had charge of ten different hospitals in the Argonne, and of the brain cases I would say that I handled 87 per cent of them.

The Court: Any further questions?

Mr. Williams: Nothing further.

Mr. Clark: May we take our recess at this time?

The Court: Yes, we will take our recess at this time. The audience will remain seated until the jury have retired.

(Recess.)

Mr. Clark: I would like to put Dr. Decker on the stand for just a single matter.

The Court: You may do so.

Recross-examination.

By Mr. Clark:

Q. Dr. Decker, if any of these X-ray plates are altered in any material respect, you could ascertain that upon inspection, could you not?

A. Yes, sir.

* * * * * * *

[fol. 1432] CHARLES GRIFFEN, recalled as a witness in behalf of the People, having been heretofore duly sworn, testified as follow-:

Direct examination.

By Mr. Williams:

Q. Your name is Charles Griffen?

A. That is right.

Q. You are the assistant chief of the Bureau of Investigation of the District Attorney's office of this county?

A. I am.

Q. Mr. Griffen, you were present at the time the defendant in this case was arrested on the 19th of April, 1936, were you not?

A. I was.

[fol. 1433] Q. And accompanied him to the District Attorney's office?

A. I did.

Q. Thereafter did you, in connection with others take him out to the premises located at 3882 South La Salle Avenue?

A. I didn't take him out at that time, but I arrived out there about 9 o'clock that night.

Q. And he was there when you arrived?

A. He was.

Q. When you arrived did you immediately start questioning him?

A. On Sunday night I did not.

Q. When did you start questioning him?

A. At about 4 o'clock in the morning.

Q. Monday morning?

A. That is correct.

Q. And who was with you at the time you started questioning him?

A. Jack Southard was there when we started questioning him and so was Everett Davis.

Q. During the questioning was there a time at which the defendant was struck by Captain Southard?

A. There was an occasion when he was slapped by him.

Q. Just state the circumstances of that occasion.

A. He had been asked questions and had been giving answers very freely all morning and Jack Southard said,

"Your wife, Mary was a very sweet girl, a very nice woman. She was very well thought of by her friends, [fols. 1434-1435] seems to have come from a good family and it is a shame she had to die the way she did in this pool out there." Mr. James——

Mr. Clark: Just one moment. I object to anything that Mr. James said at that time upon the ground that Mr. James was so circumstanced, was acting under such force, duress and coercion that anything he said was not his voluntary expression and could not be.

The Court: Objection overruled. The matter was first brought into the record by the defense, and further, I think it is admissible on another ground. Proceed.

A. Mr. James said, "She was not very much." He said, "She was a whore when I married her." At that time Jack was sitting in a chair just opposite his chair and he reached over and slapped him and I said, "Take it easy, Jack".

Mr. Williams: Was there any force or violence of any character used upon or against the defendant during the time that you were in his company?

A. There was not.

Q. Either before or after that?

A. There was not.

Q. Now, following the slap in the face did you and Jack Southard continue to question the defendant?

A. We did.

Q. And did he thereafter state in substance or effect that he had killed his wife?

* * * * * * *

[fol. 1436] Mr. Williams: Now, Mr. Griffen, did you from time to time thereafter and prior to the time that the defendant was placed in the county jail, question him again?

A. I did question him and was present when he was questioned the next evening at the house next door to his home on La Salle Street until about 1 o'clock in the morning.

Q. Were you in his company when he was taken down to be booked?

A. I was at the office when one of the officers took him up to be booked. I was not present at the time he was booked.

Q. Will you just describe as best you can the defendant's manner during the entire time that he was under your observation from the time that he was arrested until he was booked?

A. He was very cool and calm and collected at all times. He answered questions readily; if he would answer a question he would answer it at great length. As á matter of fact the length of time spent in questioning him was very small compared to the time that he gave answers. He answered all questions freely. I talked to him Tuesday morning at the office. He was very calm and collected and as a matter of fact, he was in much better shape physically [fol. 1437] and mentally than any officer who worked on the case.

Mr. Clark: I move to strike out "He was in much better shape physically and mentally than any officer that worked on the case" as being an opinion or conclusion of the witness and incompetent.

The Court: Yes, the answer will be stricken out. I think it should be confined to appearance.

Mr. Williams: Now, did he at any time while you were in his company appear to be afraid?

A. He did not.

Q. Was his conversation rational?

A. Very rational.

Q. And were his answers to the point and coherent?

A. They were, and he gave us answers to things that we had no knowledge of at the time, that proved correct afterwards.

Q. During the time that you were questioning him was there any question addressed to him on the subject of a woman at Hermosa Beach?

A. There was.

Q. Now, just state what those questions were and what his answers were.

* * * * * * *

[fol. 1438] Mr. Williams: I think the question was, was there some conversation between the defendant and you and

Jack Southard on the subject of a woman and the defendant at Hermosa Beach?

A. There was.
Q. What was that conversation?

* * * * * * *

A. Mr. James was asked if a short time after his wife's death and before the Coroner's inquest was held, he had [fol. 1439] spent the night with a woman at Redondo Beach?

Mr. Clark: Now, if your Honor, please, so that the record may be straight, may it appear that I object to this line of evidence on the ground that if it appears that the defendant answered affirmatively, it would be an irrelevant matter tending to degrade the defendant in the eyes of the jury, and of such character as would be calculated to create a prejudice against him.

The Court: Objection overruled. You may answer.

Mr. Williams: You may proceed with the answer.

A. He denied that he had been down there. He was asked if he had ever spent the night at a hotel in Redondo Beach.

Mr. Clark: I make the same objection to any reply that the witness made to such question.

The Court: Overruled. You said "Redondo". Do you mean Redondo?

A. Redondo is my recollection, Redondo or Hermosa; I am not positive about that. But I believe it was Hermosa at that. He said that he had never been down there at any time during that period. After that Mr. Southard read a letter to him that he had in his possession.

Mr. Clark: May I ask, if your Honor please, when he says, "Had in his possession" whether he means the defendant had it in his possession.

A. Mr. Southard had in his possession. After reading it Mr. James said, "So she did write into the District [fols. 1440-1441] Attorney's office about it, did she." He said, "That woman tried to blackmail me". I said, "What do you mean by that?"

Mr. Clark: It is understood of course——

The Court: The objection will ride.

Mr. Clark: That I have the objection to all of this line of testimony.

The Court: Yes.

A. He said, "I went down there to the beach with that woman, but she tried to collect money from me afterwards to keep quiet on it. I said, "Where did you meet this woman? He said, "Well," when he first met her she was living up at Ninth and Alvarado. I think he said he first met her at the Italian Village. It was a very lengthy conversation. I can't attempt to relate all of it but as near as I remember now he told us where she lived and that he had met her at her home several times. We asked him what address, and he said he couldn't remember, but he could take us up there and show us where the house was. We asked him what her name was and he told us that her name was Madge Reed.

By Mr. Williams:

Q. Prior to that statement by him did you know what this woman's name was?

A. I didn't know the woman's name, nor where she lived.

Q. And thereafter did the defendant take you to a place which he pointed out as her former residence?

* * * * * * *

[fol. 1442] A. Mr. James did direct us to, or rather pointed out a house that this woman lived in and he said he visited there at that address.

Mr. Williams: You may cross-examine.

[fol. 1443] Cross-examination

By Mr. Clark:

Q. Mr. Griffen, as I understand, you were one of the officers who first took the defendant into custody, is that correct?

A. I was.

Q. That was upon a Sunday morning, was it not?

A. That is correct.

Q. And you would say about 9:00 o'clock in the morning?

A. It was approximately that time, in that neighborhood.

Q. And then, having taken him into custody, did you upon that morning take him before a Magistrate?

Mr. Williams: Objected to as immaterial.

The Court: Sustained. Well, I will allow the question to be answered. You may answer.

A. I may answer?

By Mr. Clark:

Q. Yes.

A. Not on Sunday morning.

Q. Where did you take him?

A. He was taken to the adjoining house for a short time, and then taken to the office of the District Attorney.

Q. And about how long did he remain in the office of the District Attorney?

A. He remained there until—as far as I know, until 5:00 or 5:30.

Q. That is in the afternoon?

[fol. 1444] A. That is correct.

Q. Did you remain with him during all of that time?

A. Not all of that time, no.

Q. You were with him a considerable portion of it?

A. No, I probably spent one hour in his presence during that time.

Q. And then when he was taken back to the adjoining house, as I understand, you did not accompany him?

A. No, I didn't take him back, no.

Q. You did go back to that adjoining house while he was there?

A. I went back about 9:00 o'clock at night.

Q. You made that visit about 9:00 o'clock that night, in the course of your investigation of this murder charge, did you not?

A. I went back there in the course of this investigation, yes, sir.

Q. And the house you speak of is about a five-room house, is it?

A. It was.

Q. And the time you went back there, how was it furnished?

A. It was a six-room home, I should say.

Q. How was it furnished at the time you went back there?

A. In the living room there was a piano, there were two overstuffed chairs——

Q. Well, Mr. Griffen, I don't want to go into too much [fol. 1445] detail, but can you say it was fully furnished?

A. Yes, it was a furnished home.

Q. And when you reached there that evening, whom did you find there?

A. Jack Southard was there, and John Martin was there, and Everett Davis, and I believe Scott Littleton. I believe that was all, unless Harry Dean was there.

Q. Martin, Davis, and Littleton at that time were all investigators for the District Attorney, were they not?

A. That is correct.

Q. And were working with you on this charge of murder, were they not?

A. Well, we were probably interested at that time in two——

Q. I didn't ask you that. They were working with you upon that charge?

A. On the murder, limiting it to the murder—it was both cases.

Q. Answer my question.

A. I answered just what you asked me.

The Court: Just a moment; gentlemen; you are both talking together. Proceed.

By Mr. Clark:

Q. Of course, if they were working with you on that——

A. They were working with me on the incest and the murder charge.

[fol. 1446] Mr. Clark: Now, I move that that be stricken.

The Court: That may stand.

By Mr. Clark:

Q. You have been trying to answer questions the way you wanted to, and interpret them, and make your own answers, haven't you?

Mr. Barnes: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

By Mr. Clark:

Q. You have been sitting there on the witness stand trying to think how you could say something that would prejudice this defendant in the eyes of the jury, have you not?

A. My answer to your question is that I have answered the questions you asked.

Q. Well, answer the questions directly.

A. I cannot answer without trying to explain why, and you have tried to tie me down to a question of whether we were only investigating the murder, and you know that isn't true, Mr. Clark, that I would attempt to give an unfair answer.

Mr. Clark: I am not going to take the trouble, your Honor, to reply to the personal insinuation.

The Court: Proceed with the examination of the witness.

Mr. Clark: I am asking him concerning his examination of the case, and not the desire that is in his mind as he testifies, and I am waiting for the answer to that question. [fol. 1447] Will you read the question, Mr. Reporter?

(Question read by the reporter.)

A. If the truth would hurt him, I probably have.

Q. And all that you have had in your mind was to tell the truth, is that the truth, Mr. Griffen?

A. That is it.

Q. And to the questions that were asked you, concerning the particular matters about which you were interrogated, you have told the truth?

A. That is the only thing I have answered.

Q. I disagree with the witness on that. Mr. Griffen, how much do you weigh?

A. 220 pounds.

Q. Did you weigh that at the time that your testimony refers to?

A. No.

Q. What was your weight at that time?

A. 245 pounds.

Q. How old are you?

A. I am 40 years of age.

Q. And when you got back there at 9:00 o'clock on the evening of which you speak, in what part of the house did you find the defendant?

A. He was sitting in the front room.

Q. By himself?

A. No, the other officers were present there.

[fol. 1448] Q. Was he handcuffed?

A. I never have seen Mr. James handcuffed.

Q. And you didn't see Mr. James handcuffed on that occasion?

A. May I finish the answer? Except after he was booked in the Sheriff's office.

Q. Was he fastened in any way?

A. No, he was not.

Q. Was there any one else in the room with him?

A. The night I arrived?

Q. Yes.

A. I have already said "yes", and I repeat it.

Q. Were all three of these investigators in the room?

A. I wouldn't say that. I am not positive as to who was in the room when I first arrived.

Q. Well, what were the other people who were in the room doing at the time of your arrival?

A. They were carrying on a conversation.

Q. Were they sitting or standing, those that were present?

A. Those that were present were sitting. I was the only one standing.

Q. How were they seated with relation to Mr. James?

A. I can recall where Mr. James was seated, but I do not know that I can recall where any other individual was seated at that time.

Q. And you did not, at that time, participate in the [fol. 1449] conversation, as I understand you?

A. Yes, sir, I participated some in the conversation.

Q. You did, however, remain in the house?

A. Yes, sir, I did remain in the house.

Q. Did you remain in the same part of the house that the defendant was in?

A. It was in the same house. I passed through the room once or twice going to the bathroom, and the bedroom.

Q. Whenever you went through that room you saw some other investigators in it?

A. I did.

Q. And they were talking to the defendant, were they?

A. Yes, sir.

Q. And whenever you noticed the conversation, they were talking about the death of the defendant's wife, were they not?

A. I cannot say that I paid any attention to the conversation that evening.

Q. Now how many beds were there in that house at that time?

A. Two full-sized beds, and one single bed.

Q. Now, I suppose that you occupied one of those beds during that night did you?

A. Part of it I did.

Q. May I ask you what time you went to bed?

A. Very shortly after I arrived. To clear it up for [fol. 1450] you, I shaved and took a bath and immediately went to bed.

Q. And you stayed in bed until about 4:00 o'clock?

A. That is right.

Q. Had you arranged for some one to awaken you at that time?

A. Yes, sir.

Q. That was so that you could relieve one of the other parties that was with the defendant?

A. It was.

Q. And you did relieve him?

A. I did.

Q. And at the time you were awakened and went in, you found the defendant in the same room that you had seen him in when you first came to the house, did you?

A. That is correct.

Q. And he was seated in the same chair?

A. The same large overstuffed chair.

Q. And he was fully dressed at 4:00 o'clock in the morning?

A. I believe he was.

Q. And when he was taken up to the District Attorney's office he was kept handcuffed?

A. Yes, he was kept handcuffed continually until he was taken there.

Q. He was taken back to this house, was he not?

A. I cannot say I had other duties around the office [fol. 1451] that day——

Q. You cannot say?

A. I do know he made an arrangement to see Mr. Silverman alone with one of the officers looking at him from the adjoining room.

Q. If he left the District Attorney's office before he was taken back to the house, you have no knowledge about it?

A. I think he went out to lunch.

Q. You didn't see him?

A. I didn't see him personally. I told somebody to take him; I didn't see it personally, because I didn't go with him.

Q. And then getting back to the house, when you awakened at 4:00 o'clock, and when you got up at 4:00 o'clock, I suppose you got up and dressed and went into the room where the defendant was?

A. I put my clothes on, yes.

Q. And after you got there, you and the defendant and who else was in there then?

A. When I first came in, Jack Southard was there, or came in with me. We both had been sleeping until 4:00 o'clock that morning. John Martin was there, and Tom Cavett. They left about 4:30 or 4:00 o'clock.

Q. And then you remained personally with the defendant how long?

A. Until the time that we took him to 9th and Alvarado, [fol. 1452] and I would say that was about 9:00 o'clock.

Q. And on the trip to 9th and Alvarado, how long were you gone?

A. I didn't return to the house after we got to 9th and Alvarado.

Q. During the time that you were with the defendant, from 4:00 o'clock until you left for 9th and Alvarado, you were talking to the defendant, were you not?

A. Most of the time.

Q. And he was still fully clothed, was he not?

A. He was.

Q. And sitting in the same place where you had seen him seated when you first went there?

A. I think he had changed the position of his chair from the position he was in when I first saw him that night.

Q. During all these conversations you had with him there in the house, Mr. Silverman was not present, was he?

A. No, he wasn't present.

Q. No attorney was present at that time?

A. Oh, on one occasion Gene Williams was there.

Q. I am speaking of an attorney practicing law now.

A. I was the only attorney present. You didn't know I was an attorney, did you?

Mr. Clark: Oh, yes, I did, Mr. Griffen. I knew that several years ago. I am tempted to tell the story, but I

won't. When I said that one attorney was there, why, I [fol. 1453] beg your pardon. I didn't mean any discourtesy to you. What I mean was that no attorney was there who was engaged in the practice of his profession?

A. I don't know what you call it.

Q. During the time that you were talking, or during the time that you were there in the room of the defendant, about 9:00 o'clock, various of the men in the room took part in the conversation, didn't they?

A. As I told you before, I didn't pay any attention to that conversation. My recollection is that there were but two officers present with Mr. James when I arrived.

Q. And during the time that you remained in the room you knew that questions were being asked of Mr. James by more than one man?

A. I couldn't say that. I merely walked into the bathroom, to the kitchen, and I went into the bedroom, and into the bathroom to get a bath, and then walked through the room again, going to and coming back from my bath.

Q. Without going into anything that was said at the time you were awakened, there was some communication between Mr. Davis and Mr. Martin on the one hand, and you on the other, wasn't there?

A. There was conversation in the presence of Mr. James as to what had been said during the course of the evening.

Q. No, I was asking if there wasn't a communication to you by these men, out of Mr. James', presence, before you [fol. 1454] got up and got dressed?

A. Out of his presence?

Q. Out of his presence, yes.

A. The only communication was that it was 4:00 o'clock, time to get up.

Q. I didn't ask you what it was; I asked you if there was one?

A. That is the only one I know of.

Q. Now, during the remaining time before you went out to this house at 9th and Alvarado, both you and Mr. Southard took part in the questioning, didn't you?

A. May I have that question again?

(Question read by the reporter.)

A. I don't know just when you mean. Do you mean Sunday afternoon?

Q. I mean Sunday morning, between the hours of 4:00 and 8:00 o'clock.

A. Monday morning between 4:00 and——

Q. Monday morning was it?

A. Well, I don't know when you mean.

Q. I mean the morning that you got up at 4:00 o'clock. That was Monday morning, wasn't it?

A. Monday morning that I got up practically all of the conversation was between Mr. James and myself and Jack Southard.

Q. And both you and Mr. Southard asked Mr. James [fol. 1455] questions, didn't you?

A. That is correct.

Q. You or Mr. Southard determined the questions that were asked Mr. James, didn't you?

A. Naturally.

Q. Mr. James wasn't even asked whether he wanted to talk to you or not, was he?

A. He didn't say that he didn't.

Q. He wasn't asked whether he desired to be questioned or not, was he?

A. I don't know that I put that exact question to him, no.

Q. Some of the questions that you personally asked him he didn't answer, isn't that true?

A. I don't recollect of his ever refusing to answer a single question.

Q. Now, the same question was asked him several times on occasions, wasn't it?

A. I don't know that anybody sat and repeated questions. There may have been a question asked, and at some time during the course of the morning it may have been asked again.

Q. Sometimes questions were asked, and he just sat there without answering, isn't that the fact?

A. My recollection is that he very readily answered questions. I don't recall; there may have been some instance [fol. 1456] of some question he didn't want to answer, but I don't recall that.

Q. Isn't it a fact that to some questions he returned the answer that you could go to hell?

A. I wouldn't say that he ever told me that.

Q. Would you say he did not?

A. I would say he did not.

Q. Did he tell Mr. Southard that in your presence?

A. I have no recollection of his telling Mr. Southard that.

Q. Now, as I understand your testimony given a moment ago, the defendant was taken out to 9th and Alvarado, is that correct?

A. That is correct.

Q. You and Mr. Southard went with him?

A. No, he rode in a car with Mr. Davis and Mr. Kynett.

Q. Mr. Kynett is a police officer in the City of Los Angeles, I believe?

A. That is correct.

Q. When did Mr. Kynett join the party?

A. He came in while we were eating breakfast.

Q. Came in by arrangement, did he?

A. No, I had no arrangement with him at all.

Q. He just happened to drop in?

A. No, he was the man that furnished the Dictaphone on the case, and had been interested in it, and had been there [fol. 1457] every night until the time of the arrest, and that next morning he did come in.

Q. That is Mr. Earl Kynett, is it not?

A. That is right.

Q. And how long was he there before you started out on this expedition?

A. I can't recall exactly, but I don't think he was there over 15 minutes, or half an hour.

Q. Were you pretty busy during that 15 minutes or half hour?

A. Well, I am not in the habit of cooking breakfast, and when I cook breakfast it is quite a bit of work.

Q. Were you cooking breakfast while Kynett worked on the defendant?

A. No, I don't think Mr. Kynett worked on him.

A Juror: Will you speak louder.

By Mr. Clark:

Q. Did you hear any loud voices out in the room?

A. No.

Mr. Williams: If your Honor please, I think one of the jurors asked the witness a question.

The Witness. Asked me to speak louder.

Mr. Clark:

Q. Did you hear any loud voices out in the room where Mr. Kynett and the defendant were while you were getting breakfast?

A. I did not.

Q. Did you hear any loud noise of any kind out there? [fol. 1458] A. No, sir.

Q. Was any one else there in the room with the defendant and Mr. Kynett?

A. I don't recall that Mr. Kynett stayed in the living room. I think that when he came in the house he came to the kitchen where I was.

Q. Your recollection is that he was in the kitchen away from the defendant?

A. That is my recollection.

Q. And the defendant, you say, rode out to this house with Mr. Kynett?

A. And Mr. Everett Davis.

Q. You were in another car?

A. That is correct.

Q. And the car that the defendant rode in, I suppose Mr. Kynett was the driver?

A. I am not positive whether it was Mr. Kynett's car, or Mr. Davis' car.

Q. At any rate, one of them drove, and the defendant sat in the seat beside the driver, did he?

A. My recollection is he sat in the back seat; at least, he was sitting in the back seat when I saw him in front of the house at 9th and Alvarado.

Q. Was he in the back seat by himself, or was one of the other men in the back seat with him?

A. When I saw him he was by himself, and one of the [fol. 1459] officers was standing beside the car. He may have been riding in the back or the front; I am not sure.

Q. At that time the car was stopped?

A. That is correct.

Q. Did you precede, or follow that car?

A. Well, I can't say now which happened. At least, we both arrived at 9th and Alvarado.

Q. After going to 9th and Alvarado how long was it before you again saw the defendant?

A. It was about noontime, I believe.

Q. That would be noon of the same day?

A. That is correct.

Q. At that time you returned to the same house where the defendant had been?

A. No, that was in the office of the District Attorney.

Q. Oh. The defendant was again taken to the office of the District Attorney, is that correct?

A. He came into the office while I was there.

Q. You say he came in; you mean he was brought in, don't you?

A. He was in custody.

Q. Who was with him then, do you remember?

A. I am not positive just in whose custody he was when I saw him, but I believe it was Everett Davis.

Q. And he remained there in the District Attorney's office how long on that occasion?

[fol. 1460] A. I don't know what time he left the office. I didn't take him away. I asked one of the other boys to take him down to the house, and what time they left the office I couldn't say.

Q. Up to that time he had not been taken before any Magistrate?

A. That is correct.

Q. And no criminal charge of any kind had been filed against him?

Mr. Williams: Objected to as immaterial.

The Court: You may answer.

A. There had been no complaint filed.

Mr. Clark: Up to the time that you saw the defendant in the District Attorney's office he had not been permitted to sleep after he had been taken into custody? Now, let me reframe that question so that there will be no doubt in your mind about what it is. Up to the time that you saw the defendant in the District Attorney's office about noon Monday, he had not been given any opportunity to sleep since he was first taken into custody, isn't that true?

A. I can only honestly speak for the time that I saw him.

Q. Well, so far as you know that is the fact, isn't it?

A. During the time that I saw him he was not sleeping.

Q. You, I believe, are assistant chief investigator for the District Attorney, are you not?

A. That is correct.

[fol. 1461] Q. You were such Assistant Chief Investigator at the time to which your testimony relates, were you not?

A. That is correct.

Q. These other investigators were working under your direction, were they not?

A. That is correct.

Q. Now, when you saw him at the District Attorney's office on Monday, was any conversation had with him there?

A. At the District Attorney's office?

Q. Yes.

A. With Mr. Silverman.

Q. Oh, I thought the conversation with Mr. Silverman was on Sunday. Am I wrong?

A. No, I didn't say that. I said on Monday.

Q. Now, let's get the thing straightened up. Did the defendant see Mr. Silverman at all on his first visit to the District Attorney's office?

Mr. Barnes: That is objected to on the ground that it is indefinite. We don't know when Mr. Silverman's first visit to the District Attorney's office was.

The Court: I think the question should be reframed. It has some ambiguity.

Mr. Clark: Yes, I will reframe it.

The Court: The use of the personal pronoun made it ambiguous as to whether you were referring to the defendant or to Mr. Silverman.

[fol. 1462] By Mr. Clark:

Q. Did you see Mr. Silverman in the District Attorney's office at any hour on Sunday, the day that you arrested the defendant?

A. I did not.

Q. It is a fact, is it not, that the defendant asked you on that day to communicate with Mr. Silverman?

A. I couldn't say that he did or that he did not. I have no recollection of it.

Q. By the way, you were in Mr. Fitts' room when the defendant was in there that Sunday, weren't you?

A. I was in there on one occasion when he was there.

Q. Isn't your recollection that the occasion that you were in there was on Sunday?

A. I don't know how many occasions he may have been in there. I was in and around the office on different occasions, and I was in the office on one occasion when he was there. Whether I was there every time he was in Mr. Fitts' office, I don't know.

Q. I didn't ask you that. On the occasion that you did see him in Mr. Fitts' office, you heard him ask Mr. Fitts to have Mr. Silverman there, didn't you?

A. I don't recall that.

Q. Didn't you hear Mr. Fitts tell him that Mr. Silverman was out of the City, and couldn't be reached?

A. I don't recall that.

Q. Didn't you hear him ask Mr. Fitts to have Mr. Parsons there?

[fol. 1463] A. No, I never heard Mr. Parsons' name mentioned at any time in regard to the defendant.

Q. After Mr. James' visit to the District Attorney's office on Sunday ended, how long was it before you again saw Mr. James?

Mr. Barnes: May it please the Court, that has been asked and answered on cross-examination before.

The Court: It may be preliminary to other questions. Answer the question.

A. After I left the office, which was between 5:00 and 6:00, I saw him again at the house at 9:00 o'clock.

By Mr. Clark:

Q. I am not speaking of Monday. There seems to be a misapprehension. I am speaking of Sunday.

A. That is what I am talking about, Sunday.

Q. I beg your pardon. I misspoke, myself. I am not speaking of Sunday; I am referring to Monday. Wasn't he there about noon Monday?

A. About noon Monday?

Q. Yes.

A. I wasn't down at the house during the day time at any time on Monday, excepting when I left there about 8:00 o'clock, when we went up to 9th and Alvarado, until 7:00 that night.

Q. You saw the defendant, then, when you went down to the house at 7:00 Monday night?

[fol. 1464] A. I can't be positive whether he was there when I arrived, or he arrived shortly after I did.

Q. You saw him in the same room that you had seen him in the day before?

A. He was in the living room that evening, yes.

Q. Wearing the same clothes?

A. Yes; I think he had a change of shirt, as I recall.

Q. Sitting in the same place?

A. He was sitting in the same chair, in just a little different location.

Q. With the same men in the room?

A. No, on Monday night—that is, at 7:00 o'clock, Harry Dean—Harry Dean wasn't there that night. I believe that is the night Gene Williams was down. I am not quite clear as to the night he was there, but I believe it was Monday night.

Q. Now, you hadn't seen the defendant in bed at any time up to that 7:00 o'clock visit, after he had been taken into custody, had you?

A. Well, he was in bed when he was taken into custody, and remained in bed for about 15 minutes afterwards.

Q. That was the last time you had seen him in bed, up until you went back to the house Monday night?

A. That is correct.

Q. You hadn't been present when he had had anything to eat, had you?

[fol. 1465] A. Oh, yes.

Q. When did you see him get anything to eat?

A. I had breakfast with him on Monday morning.

Q. You and he and Earl Kynett?

A. I had my breakfast, and at that time he had a cup of coffee.

Q. The coffee was given to keep him awake, wasn't it?

A. No, because he said that was all he wanted.

Q. That was all he got, anyway, wasn't it?

A. No, he got more afterwards.

Q. When?

A. I asked him if he wanted to eat after we got up to 9th and Alvarado, and he said he did, so I told the boys to take him out to eat.

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[fol. 1466] Mr. Clark: It is the substance of that testimony that until the defendant was booked at the County jail he was never handcuffed, so far as you know. Is that correct?

A. I had never seen him handcuffed, nor had I ever heard of him being handcuffed.

Q. And if the transcript of your testimony indicates any different answer from the one you have just given, there must have been some mistake in the transcript?

A. I am positive of that.

* * * * * * *

[fol. 1467] Q. Now, I believe you stated that on Monday evening, the day following the arrest, Mr. Williams, the Deputy District Attorney seated at the counsel table here, came down to the house where Mr. James was being held?

A. I said that I was somewhat confused as to that. I know that he was down one of the two nights, Sunday or Monday night. As to which, I couldn't say. It might have been both, but I know that he was down one of those nights.

Q. Referring now to the morning of the Monday in question, what were the questions that you remember, leaving out of consideration the answers, what were the questions that you remember Jack Southard asking the defendant between 4:00 and 8:00 that morning, with regard to the death of the defendant's wife?

A. To attempt to give you all of the questions that were asked would be quite a task. I remember distinctly, as testified yesterday, the questions that were asked with [fol. 1468] regard to Madge Reed, and the defendant going down to Hermosa Beach, whether he had ever stayed all night at Hermosa Beach between the time of his wife's death, and the time the inquest was held.

Q. Well, as to those particular questions, Mr. Griffen, I assume you made no memorandum at the time?

A. No.

Q. But the substance of those is all that you can attempt to give now?

A. That is correct.

Q. And that as to any other questions with regard to the death of Mrs. James that were asked that morning, you haven't even the substance in mind?

A. Oh, I have some, yes.

Q. All right.

A. I could go on to quite some length, I think, as to what was said.

Q. Suppose for the purpose of testing your recollection I ask you to give us the substance of four or five more questions that Mr. Southard asked him?

A. He was asked concerning the death of his wife in Colorado. He was asked about the automobile accident, and subsequent drowning. He was asked about his movements from the time he left home the date of his wife's death, that morning up until about noon—or I believe he was asked about it the entire day.

[fol. 1469] Mr. Clark: Thank you. I think that that will be sufficient on that.

Q. Now, on each of these subjects he was asked a number of questions, was he not?

A. Yes, sir, he was asked a number of questions.

Q. You couldn't remember the exact language of any of them, could you?

[fol. 1470] A. I wouldn't attempt to give you exactly the language, no.

Q. And it was sometime the Tuesday following before he was booked at the county jail, was it not?

A. I think it was sometime about 11 o'clock when he went up to the county jail and was booked.

Mr. Clark: I have only three or four more questions, your Honor.

Q. Now, did you remain with the defendant from the hour of Monday evening that you have been discussing until he was booked in jail?

A. Was I with him in person?

Q. Yes.

A. No, I was not.

Q. But you——

A. What time do you mean?

Q. Well, I suppose that you were there at 7 o'clock that evening, were you not?

A. I arrived at about 7 o'clock, and I was there shortly after, and I was there until about 1 o'clock in the morning.

Q. About how long—Well, you have answered the question. You were there until 1 o'clock in the morning?

A. Yes, sir.

Q. Practically all that time you carried on some conversation?

A. I did not, no.

Q. When I say "you"——

[fol. 1471] A. Someone was.

Q. Someone in the group?

A. Yes.

Q. And after 1 o'clock Tuesday morning, when did you next see him?

A. What time after 1 o'clock Tuesday morning?

Q. Yes.

A. I would say that I got up about 7:30.

Q. And you stayed that night in the same house?

A. That is correct.

Q. Where in the house did you see him the next morning?

A. I don't know whether he was in the kitchen or whether he was in the living room when I first saw him.

Q. At any rate, when you did see him the next morning he was fully dressed?

A. He was.

Q. Then, as I get the sequence of the events, he was taken up to the jail and booked about 9 o'clock that Tuesday morning, if I have it correctly?

A. That is not what I said.

Q. What is the fact?

A. I didn't take him up and book him. At some time that morning, say 11 o'clock, I told someone to take him up and book him. Now, who it was, I don't know.

Q. You were not with him. I thank you for the correction. I had heard you, I guess, imperfectly yesterday, and since my hearing was imperfect, it might be that the same impres-

[fol. 1472] sion may have reached some juror. I don't want any juror to be under a misapprehension as to what you did say. As I get it now, you were not present whe he was booked at the county jail?

A. That is correct.

Q. You were present at the house where he was being held until about 11 o'clock that Tuesday morning, is that correct?

A. No, I wasn't.

Q. I beg your pardon?

A. I gave the instructions that he be booked, down in the office. I had been working in the office since 9 o'clock in the morning and sometime during the course of the morning, I assume about 10:00 or 11:00, I——

Q. When you left for the office, you left him out in the house where he was being held, is that correct?

A. He left at about the same time I did, to come to the office.

Q. He was taken up to the District Attorney's office a third time, is that right?

A. That is correct.

Q. And was he, at any time while he was in the custody of your men, taken to any other place that you know of, that you haven't told us about? When I say "while he was in custody", I mean after his arrest, and before he was booked at the county jail.

[fol. 1473] A. The District Attorney's office, his house, the house next door and the county jail, are the only places I know that he was at during that time.

Q. Now——

A. When I said "his house" I meant the house on La Salle, adjoining the place that we were staying in.

Q. Now, did you see him in the District Attorney's office just about the time you gave instructions to book him at the county jail?

A. I think that I went in with the officers and told them to take him up to the county jail.

Q. Now, before that time you had only seen him struck once, is that correct?

A. That is correct.

Q. That was one blow struck by Mr. Southard?

A. That is correct.

Q. But at the time you last saw him at the District Attorney's office before he was booked, is it not a fact that both of his ears were bruised and swollen?

A. I would say not. He did complain about one ear being swollen and I looked at it and I said, "I can't see anything wrong with it".

Q. And if he had any sleep at any time from the time of his arrest until he was booked, you have no personal knowledge of it? That is a fact, isn't it?

A. You mean by that, I didn't see him asleep?

[fol. 1474] Q. You didn't see him asleep.

A. I didn't see him asleep, no.

Mr. Clark: I think that is all.

Mr. Williams: That is all. Is Jack Williams here?

JACK WILLIAMS, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.
The Witness: Jack Williams.

Direct Examination.

By Mr. Williams:

Q. Mr. Williams, what is your occupation?
A. Deputy Sheriff.
Q. Los Angeles County?
A. Yes, sir.
Q. Were you a deputy sheriff of Los Angeles County on April 21st, 1936?
A. Yes, sir.
Q. What were your duties at that time?
A. I was prowling the jail at that time.
Q. I can't hear what you say.
A. I was prowling the jail at that time.
Q. What does that mean?
A. Other officers worked in a certain section of the jail [fol. 1475] and then there are officers assigned to what they call "prowling". They work the entire jail.
Q. In other words, you worked the entire jail?
A. Yes.
Mr. Parsons: What day was that, Mr. Williams?
Mr. Williams: The 21st.
Q. Do you remember the occasion of Robert James being booked on that day?
A. I do.
Q. Were you present?
A. Yes, sir.
Q. Just tell us what you saw of the defendant at that time?
A. Mr. James came to the bathroom from the "I" room, or the identification room where he was fingerprinted and pictures taken.
Q. You will have to talk a little more loudly, because I can't hear what you say.
A. All right. He was brought to the "I" room and from the "I" room—The "I" room is the identification room where they take fingerprints and photographs. He was given a bath. His clothes was taken from him. He was

given blue denim. From there he goes to the hospital or to the tank.

Q. Is that the regular course of a prisoner going through the county jail?

A. It is, yes sir.

Q. Did you have any duties to perform at the time he was [fols. 1476-78] undressed and took his bath at that time?

A. To look his body over and also his clothes.

Q. Did you at that time, examine the body of the defendant?

A. I did.

Q. And did you observe any black and blue spots upon his body in any place?

A. None, no sir.

Q. Did you observe any cuts or abrasions of any kind or character at that time?

A. None whatever.

Q. Was it a part of your duty to observe and make a note as to whether there were bruises or cuts or abrasions upon a prisoner when he came in?

A. Yes, sir, of course. That is done in the bathroom. It is done in the booking office and also in the hospital and if there is anything of that sort on a person, because we don't know who they are, what they are in for, a record is made of that both in our office, which is the bathroom, and in the hospital. Then, that record goes down to the attorney's room and is put on the log.

Q. And in the case of this defendant you found no marks or bruises of any kind or character?

A. No sir, none.

Q. You made a note of none?

A. No, sir.

* * * * * * *

[fol. 1479] W. C. Phillips, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. W. C. Phillips.

Mr. Clark: If your Honor please——

The Court: Yes?

Mr. Clark:—I have no knowledge as to what this witness is going to testify to, but we are willing to stipulate that

both his testimony on direct and cross examination will be the same——

Mr. Williams: Well, I wouldn't say that he was going to testify to the same matter, but he saw him on the same occasion, immediately prior to the time that——

Mr. Clark: Well, you don't think he saw him stripped?

By Mr. Williams:

Q. Did you see him stripped?

A. No, sir.

By Mr. Clark:

Q. Well, probably you saw him three or four times, and searched him——

A. I searched the man when he was booked in the jail.

[fol. 1480] Direct Examination.

By Mr. Williams:

Q. At that time did you observe any portion of his body?

A. With his clothes on, his face and hands, and without his hat, yes.

Q. Did you observe at that time any marks or bruises or discoloration upon his face, or head, or ears?

A. No, sir, there was none.

Q. Was it part of your duty in the jail to observe such matters when a man is booked?

A. Yes, because if there are any bruises, why we send him to the hospital directly.

Q. And do you make memorandum of such bruises, if any such bruises were there?

A. Yes, sir.

Q. Did you make any such memorandum in this case?

A. There wasn't any to make notes of.

Mr. Williams: That is all.

Cross Examination.

By Mr. Clark:

Q. Mr. Phillips, when you searched the defendant, did you run your hands down his body?

A. Very thoroughly.

Q. Running down, starting with his shoulders, clear down to the thigh joint?

[fol. 1481] A. Possibly.

Q. You had your right hand resting upon his right groin, just about where my hand is resting here now, didn't you?

A. I didn't leave my hands resting anyplace.

Q. Well, your hand ran over the right groin?

A. Possibly.

Q. And you felt swelling there?

A. Nothing pronounced.

Q. Whether pronounced, or not, you did feel a swelling there?

A. No, sir.

* * * * * * *

Everett Davis, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Everett Davis.

Direct Examination.

By Mr. Williams:

Q. Mr. Davis, you are an investigator of the District Attorney's office of Los Angeles County?

A. That is correct.

[fol. 1482] And you were so engaged in the month of April, 1936?

A. I was.

Q. Do you know the defendant in this case?

A. I do.

Q. Do you remember having been in the company of the defendant at 3882 South LaSalle Avenue on Monday, the 20th day of April, 1936?

A. I was.

Q. Were you there during the night between Monday and Tuesday, April 20th and 21st?

A. That is correct.

Q. And do you remember my having appeared at that house that night?

A. I recall that, yes, sir.

Q. Now, were you present when I had a conversation with the defendant?

A. Present during that whole conversation.

Q. You were with the defendant when I started to talk with him, were you?

A. I was.

Q. Did you stay with him during the entire time that I talked to him?

A. Yes, sir.

Q. Thereafter did you stay with him after I had left?

A. During the greater portion of the night.

Q. Yes. Now, during the time that I was talking with [fol. 1483] the defendant, did I say to him in substance or effect that I had authority to promise him if he made a confession he would not receive the death penalty, but would receive life imprisonment?

A. There never was any such statement made.

Q. And did I say to him in substance and effect that if his crime was not too heavy I might be able to get manslaughter for him?

A. You did not.

Q. Do you remember what I did say on the subject of authority?

A. Well, I recall specifically that you told the defendant that no one in connection with this case had any authority to promise him anything, that we were particularly interested in the death of his wife, and that if he had any story to tell us, we would be willing to listen to it.

Q. And do you remember how long a time I talked with him?

A. Well, I would say it was the better part of two and a half or three hours.

Q. And during that time did I discuss any subject with him other than the facts of the death of his wife?

A. My best recollection is that was the only subject that was discussed. There was a possibility that some—in the early part of the conversation he might have referred to the particular incident that he had been arrested for the day prior.

[fol. 1484] Q. Now, were you present when he was arrested?

A. I was in the vicinity, but not present in the house.

Q. After I stopped talking to him, and left him, did you continue to stay with him the balance of the night?

A. That is correct.

Q. And who else was with you during the balance of the night with the defendant?

A. Well, there was at times, I believe, Mr. Cavett, and Harry Dean.

Q. Now, after I left him, did you have any conversation with him on the subject of sleep?

A. You are speaking now of the——

Q. The night between Monday and Tuesday, the same night I was there.

A. About a quarter to 4:00, or 3:30—I would say 3:30 or a quarter of 4:00 on Tuesday morning the defendant went to sleep, and was not aroused until about 8:00 o'clock, when he was called to the kitchen for breakfast, or whatever he wanted that was being served out in the kitchen that morning.

Q. Was breakfast being served in the kitchen that morning?

A. There was breakfast being served, hot coffee and breakfast.

Q. On the morning of Monday do you remember of going to 9th and Alvarado with the defendant?

[fol. 1485] A. That is correct.

Q. And after you went to 9th and Alvarado, did you see the defendant any place?

A. Yes, after stopping on the corner of 9th and Alvarado, we then proceeded to a cafe, one half block west of Alvarado, on Pico, where we had breakfast.

Q. Did the defendant eat breakfast at that time?

A. He did.

Q. That was Monday morning?

A. Yes, sir, that was Monday morning.

Mr. Williams: You may cross-examine.

Cross-examination.

By Mr. Parsons:

Q. Mr. Davis, you saw Mr. James for the first time on Monday morning, is that right, or isn't it?

A. I saw Mr. James for the first time in the early evening on Sunday.

Q. Sunday evening?

A. Yes, sir.

Q. About what time?

A. About what time?

Q. Yes.

A. I presume it was about 7:00 p. m. It may have been a few minutes later.

[fol. 1486] Q. And that was at the house the District Attorney had rented on La Salle Street, is that right?

A. That is correct.

Q. As I understand, Mr. Williams came there Monday night, is that right?

A. That is my recollection, that is correct, Monday night.

Q. And about what time did he arrive?

A. I am not certain as to the exact time that he arrived at the house.

Q. Approximately?

A. Well, it was after dark.

Q. After dark. At what time did he leave?

A. I would say in the neighborhood of 12 o'clock.

Q. And about 3:30 or 4:00 o'clock Tuesday morning you state the defendant fell asleep, is that right?

A. That is correct.

Q. And where was it that he slept?

A. He was in the front room at that address, seated in a large chair with his feet on another chair.

Q. And it is a fact, is it not, that as he sat in this chair and he put his feet on another chair, the man finally fell over and went to sleep, that is a fact, isn't it?

A. May I have that question again?

(Question read by the reporter.)

A. I will say that he went to sleep. He didn't fall over.

[fol. 1487] Q. In any event he slept in one chair with his feet up on another, that is true, isn't it?

A. That is true.

Q. And sometime in the morning hours, early morning, 7:00 or 8:00 o'clock, you called him for breakfast, is that right?

A. I believe it was about 8 o'clock.

Q. And now, during the time that he was sleeping there in this chair, who was in the house besides yourself and the defendant?

A. Well, I believe Harry Dean, myself, the defendant, and I am not positive as to who was sleeping in the front room that evening, whether it was Mr. Griffen and Mr.

Southard, but I think they were there at that time; I am not positive of that.

Q. As a matter of fact, both the bedrooms had members of the District Attorney's office sleeping in them, did they not?

A. The front bedroom.

Q. Griffen and Southard were occupying the front bedroom were they not?

A. That is correct.

Q. And where were the other gentlemen?

A. They were in a separate bedroom in the middle of the house.

Q. And you were with the defendant in the front room, [fol. 1488] is that right?

A. Nearly all the time.

Q. I am speaking now of the morning of Tuesday, the early morning of Tuesday, this occurrence when you say that he went to sleep in a chair.

A. That is correct.

Q. Now, on Monday morning you stated that you went in and had breakfast in a restaurant near Ninth and Alvarado, is that right?

A. Pico and Alvarado.

Q. Pico and Alvarado?

A. Yes.

Q. And the defendant ordered some hot cakes and coffee, did he not?

A. I won't be certain. I am satisfied that he ordered breakfast. I won't be certain what he ordered.

Q. Well, does this refresh your recollection, that he ordered some hot cakes and coffee and after eating two or three pieces of the hot cake pushed it back and drank his coffee and said he didn't feel like eating?

A. I don't recall that particularly. We had our breakfast in the usual manner and proceeded out of the cafe. I don't recall any remarks that he made at the counter.

Q. You don't recall that he said anything?

A. That is correct.

Q. Do you recall anything that he ordered to eat?

[fol. 1489] A. Well, he might have had hot cakes; I am not certain of it.

Q. What was the name of the cafe?

A. I don't know.

Q. Where is it from the corner of Pico and Alvarado?

A. One half block up on the south side of Pico, between Alvarado and Hoover.

Q. A few doors down from the Security First National Bank, or are you familiar with that vicinity?

A. Well, it is a few doors from the corner.

Q. Was there any other person with you besides the defendant?

A. There was.

Q. Who was there?

A. Lieutenant Kynett of the Los Angeles Police Department.

Q. And when had he joined your party previous to that time?

A. As I recall it, he came to the address on La Salle about 6:00 or 6:30 in the morning. It might have been 7 o'clock.

Q. And went out with you and the defendant?

A. That is correct.

Q. Now, during Sunday night that you were in the house, who were there?

A. Sunday night? Myself and some other investigator. I [fol. 1490] think Mr. Charles Griffen and I think Mr. Southard, I am not certain of that.

Q. And referring again to the visit of Mr. Williams, you state that Mr. Williams discussed practically only the subject of the death of his wife with the defendant, James, is that right?

A. Excepting at the very opening of the conversation he might have referred to the incident that took place at the defendant's home, and the remaining portion of the conversation was relative to the death of his wife.

Q. So that except for a few minutes of the two and a half hours the balance of the time was devoted to a discussion of the death of the defendant's wife, is that correct?

A. That is right.

Q. Were you with the defendant when he was booked on Tuesday morning?

A. I was not.

Q. When did you last see the defendant on Tuesday?

A. If I recall correctly, it was in the Bureau of Investigation in the office of Assistant Chief Charles Griffen.

Q. At about what time?

A. Possibly 9:30 or 10 o'clock.

[fol. 1491] ROBERT P. STEWART, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Robert P. Stewart.

Direct examination.

By Mr. Williams:

Q. Mr. Stewart, what is your occupation?

A. Chief Deputy District Attorney of Los Angeles County.

Q. And you have occupied that position for a number of years, have you not?

A. I have.

Q. Do you know the defendant, Robert S. James?

A. I have talked with him and seen him.

Q. When and where did you first see him?

A. The first time I saw Mr. James was on the Saturday that he was in my office. That was in May.

Q. That is, Saturday, the 2nd of May, is it, Mr. Stewart?

A. Well, the early part of May.

The Court: Assuming the second of May was the first Saturday, would that help you fix the date?

A. I think I can say to the best of my recollection it was about the 2nd or 3rd of May. It was Saturday, I recall that, because I went home Sunday morning.

[fol. 1492] By Mr. Williams:

Q. What time of the day was it when you first saw Mr. James?

A. I think, to the best of my recollection, it was about 1:00 or 2:00 o'clock of the afternoon of that day.

Q. And did you continue to be in his company for some time after you first met him?

A. Almost continuously from that time until he left with Deputy Sheriffs Killion and Gray to eat a meal. That was along about midnight.

Q. And thereafter, did you again see him?

A. I did.

Q. About what time and for what length of time?

A. I should judge that was about half past one or two, Sunday morning and at that time [illegible]s in Mr. Fitts' office.

Q. And you were with him the first time in what portion of the District Attorney's office were you?

A. In my own office.

Q. Who were present besides yourself and the defendant?

A. Well, Davis was there, Killion was there, Gray and Fitts; I think some others came in and out about the first of it. I have forgotten who they were.

Q. During that time was he questioned?

A. Yes, sir.

Q. By whom was he questioned?

A. Principally by Mr. Fitts.

Q. And for how long a period was he questioned before [fol. 1493] he went out to get something to eat?

A. Well, it wasn't all questioning. There was a good deal of talk and discussion. I think he had some coffee and sandwiches about 6 o'clock. I think they all partook of that. I stepped out about that time for a short while. At the time he left to eat a meal, said he was hungry, with Mr. Gray and Killion, was along about midnight.

Mr. Parsons: May I have that last answer, please?

(Answer read by the reporter.)

A. It was about midnight.

Mr. Williams: During the entire time that he was there until he went to eat a meal, did you observe his manner, conduct and appearance?

A. I did.

Q. Will you describe that?

A. I sat immediately beside him, to the right, Killion to the left, Mr. Fitts across the desk, Mr. Gray behind me or to my right. He was calm, collected and cool.

Q. Was he rational or irrational in his talk?

A. He was rational.

Q. In his answers in the statements which he made was he coherent or incoherent?

A. He was coherent.

Q. And were his answers responsive to the questions which were asked of him?

A. They were.

[fol. 1494] Q. Did he at that time give any appearance of fright?

A. None whatever.

Q. During that entire time was there any force or violence used upon him?

A. None.

Q. Were there any offers or promises of immunity or reward held out to him?

A. None.

Q. Any hopes of immunity or reward extended to him?

A. None.

Q. Were all statements made by him freely and voluntarily made?

A. Yes, sir.

Q. About how long was he out with Killion and Gray when he expressed a desire to get something to eat?

A. Do you mean along towards midnight?

Q. Yes.

A. I should judge it must have been an hour or an hour and a half. That is only my recollection, my best recollection.

Q. After he returned where did you see him?

A. In the office of Mr. Fitts.

Q. Who were present at that time?

A. There were Chief Plummer of the Bureau of Investigation, Southard—I am not sure about Southard. Griffen, I recall sat in front of me. Dorothy Adams took the statement at the time. Mr. Fitts and myself, I am not sure about Southard or Davis. My recollection is that they [fol. 1495] were there, but I am not certain as to those two. Gray was there, Deputy Sheriff Gray and Deputy Sheriff Killion.

Q. At that time were questions asked the defendant?

A. Oh, yes.

Q. Who asked the questions?

A. Mr. Fitts.

Q. And did he make replies to those questions?

A. He did.

Q. Were the questions and answers taken stenographically by any person?

A. They were.

Q. By whom?

A. Dorothy Adams, a stenographer.

Q. And now, up to that time through and including the time that he made this statement, including the entire time

that he was making this statement had there been any force or violence used upon him to your knowledge?

A. No, sir.

Q. Any offers or promise or hope of immunity or reward extended to him?

A. None.

Q. Were all statements made by him, made freely and voluntarily?

A. They were.

Q. And now, will you please describe his manner, de-[fol. 1496] meanor and appearance during the time he was making the statement which was taken in Mr. Fitts' office at the time that you have just described?

Mr. Parsons: Object to that as already asked and answered.

The Court: Overruled.

The Witness: Did the Court rule on that?

The Court: Overruled.

A. He sat to the left of Mr. Fitts, at the end of the desk, very much in a relaxed attitude, smoking a cigar, perfectly composed and calm, and I should have said, in answer to your question, that Mr. Fitts had Mr. Hope brought in during the statement and confronted Mr. James while the questions were asked of Mr. James and Mr. Hope in the presence of each other, and Mr. James addressed remarks to Mr. Hope. During that time he was emotionless; there was no emotion whatsoever shown by him. He was just as calm and collected as anyone there.

Q. Did he, during that time, have the appearance of being excited?

A. He did not.

Mr. Williams: You may cross-examine.

Cross-examination.

By Mr. Parsons:

Q. As I understand it, Mr. Stewart, you first saw Mr. James on Saturday at about 1:00 P. M. shortly after lunch?

[fol. 1497] A. I should say possibly 1:00 or 2:00, that is as close as I could come to it.

Q. And almost continuously, to use your words, you were in his presence until about 6 o'clock, is that right?

A. Almost continuously covers my departure for a few moments or for five or ten minutes at a time.

Q. That occurred a few times during the course of the afternoon and evening, is that right?

A. Yes, it did.

[fol. 1498] Q. And during the afternoon, from between 1:00 and 2:00 o'clock until 6:00, there was continuous conversation going on there in the room, is that right?

A. Yes.

Q. And from time to time others of your investigators dropped in, is that right?

A. No, not very much after 2:00 or 2:30. The newspaper men were around there in flocks, and photographers, and they were sticking their heads in there about every five or ten minutes, so I just locked the door.

Q. So that after about 2:30 no other of your investigators came in?

A. There may have been one or two came to the door, and stopped in to ask a question, but I would not say to exceed three.

Q. And those men might have been Southard, Griffen or Davis?

A. It might have been Griffen, but I don't recall seeing Southard or Davis.

Q. You don't recall seeing Southard or Davis?

A. No, sir, I did not.

Q. But some time during the evening it is your best judgment that you did see Southard and Davis in and about the office while the questioning was going on?

A. I meant to state in my direct examination that I was not sure, but it was my recollection that Southard and [fol. 1499] Davis were present when Mr. James made his statement that was taken in writing.

Q. Now, at about 6:00 o'clock the parties there partook of some sandwiches, is that right?

A. I saw them drinking coffee there when I came back. I understood that they had sandwiches.

Q. You did not see them——

A. I did not see the sandwiches, because I think I went out about that time, because I had been left out of the sandwiches, and I got one for myself.

Q. Then some time shortly after 6:00 you returned, and when was it that the conference moved from your room into Mr. Fitts' room?

A. It never moved. We did break up by Mr. Killion and Mr. Gray taking Mr. James for a beef steak.

Q. When was that?

A. About midnight.

Q. And when did they return after that?

A. That, I should say, was about 1:30 or 2:00.

Q. And then where was the conference resumed?

A. In Mr. Fitts' office.

Q. Now, prior to Gray and Killion taking the defendant out, you had seen Southard about the office, had you not?

A. I don't think I saw Southard from the first—I arrived there about noon. He may have stepped into the room; I am not sure about that. It made no particular impression [fol. 1500] on me, his presence. He may have been there, but he was not in the room in the presence of James until midnight, anyhow.

Q. You knew, of course, that Mr. Southard had been working on this case for some time, some weeks?

A. I did.

Q. Now, during the course of the afternoon or evening, concerning the matters which took place, the defendant stated that he would like to see his attorney, Mr. Silverman, did he not?

A. He did not.

Q. If he did, you never heard it?

A. I did not.

Q. Do you know that he had some conversation with Mr. Fitts about that?

A. He didn't in my presence.

Q. Do you know whether or not any effort was made to reach Mr. Silverman?

A. None was made by me, and I have no knowledge of any one making any.

Q. If any effort was made, none was made in your presence?

A. None.

Q. And what time, finally, did this meeting terminate?

A. You mean in Mr. Fitts' office?

Q. Yes.

A. Well, I would have to figure back. I just judge about

[fol. 1501] 3:15 or 3:30. He talked for about an hour and a half at least in there.

Q. So it was about 3:15 or 3:30 Sunday morning when the meeting finally terminated?

A. I think that is a fair estimate.

Q. And Mr. James was then taken back, as far as you know, to the County jail?

A. He left my presence with Mr. Gray and Mr. Killion.

Q. With Mr. Gray and Mr. Killion?

A. With Gray and Killion, I think.

Q. Now, at any time during the course of these meetings, or this meeting, which took from about 1:00 to 2:30 in the afternoon until about 3:30 Sunday morning, was any request made at any time by the defendant for permission to see any person?

A. Not that I heard.

Q. Not that you heard?

A. No, sir.

Q. You knew, of course, did you not, Mr. Stewart, at this meeting that there had been a previous meeting between the defendant and certain of the investigators of the District Attorney's office, upon the 19th and 20th and 21st of April, did you not, at a house which had been rented by your office?

A. Oh, I didn't know about that. I had other duties to attend to. I didn't know that.

[fol. 1502] Q. You didn't know that?

A. I knew that he had been arrested—in fact, I got most of that out of the newspapers, because I was very busy with other matters.

Q. I grant you that you have many matters to attend to, and I am not trying to heckle you, Mr. Stewart. Did you know of this meeting?

A. No, I didn't have any knowledge of that meeting.

Q. Did you know that during the course of one of the meetings with Mr. James and Mr. Southard, that Mr. Southard had taken occasion to slap Mr. James?

Mr. Barnes: I object to that as already answered.

The Court: Objection sustained.

Mr. Parsons: Very well; that is all.

* * * * * * *

[fol. 1503] Redirect examination.

By Mr. Williams:

Q. Mr. Stewart, was there anything said by the defendant at any time on the 2nd or 3rd of May to you, or in your presence, with respect to any physical violence having been used upon him?

A. Yes, sir.

Q. What did he say?

A. You want what he said alone?

Q. The entire conversation.

A. Well, the conversation occurred between Mr. Fitts and Mr. James. Mr. Fitts asked Mr. James how he had been treated by the boys. Mr. James said Jack Southard had slapped him. Mr. Fitts asked him what he had done. He said "Nothing." Fitts turned to me and said, "Will you look into it?" I said I would, and I did.

Q. Was that the extent of any statement made by Mr. [fol. 1504] James with reference to any force or violence having been used at any time upon him?

A. That is all I heard him say.

Q. Did he say when that slap had taken place?

A. He did not.

Q. Now during the time that James was there in the office, and you were there also, was Southard, to your knowledge, ever in the company of James alone?

A. He was not, to my knowledge.

Q. Was there any person who, so far as your observation went, was continuously with James?

A. To the best of my recollection Gray and Killion, or either of them, were with him at all times.

Mr. Williams: That is all.

Mr. Parsons: That is all.

Clem Peoples, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Clem Peoples.

Direct examination.

By Mr. Barnes:

Q. Mr. Peoples, what is your business or occupation? [fol. 1505] A. I am Deputy Sheriff, Chief Jailer of the County of Los Angeles.

Q. Have you been Chief Jailer during the entire year 1936?

A. Yes, sir.

Q. You were such Chief Jailer on or about the 21st of April, 1936?

A. Yes, sir.

Q. Calling your attention to the defendant, Robert James, do you recognize him?

A. Yes, sir.

Q. Within a day or two after the defendant was booked at the County Jail which was, as I understand, about the 21st of April this year, did you see him?

A. Yes, sir.

Q. And at that time did you talk to him?

A. Yes, sir.

Q. Did you notice any marks, bruises, scratches or mars of any kind about his person that you could see, that portion of the person that you could see?

A. Well, he was dressed in his dungarees, and the portion of him I saw was his face and his hands. I didn't notice any marks on him at that time.

Q. And did he make any complaint to you about mistreatment at that time?

A. No.

[fol. 1506] Q. What was the occasion of having the conversation?

A. It had been reported to me that James was a little bit sullen to the checking officers, and I called him in to have a little talk with him, as I do in many instances of that kind.

Q. Just as jail discipline?

A. Yes, that is right.

Mr. Parsons: I move to strike it out as incompetent, irrelevant and immaterial.

The Court: Overruled. I think it is proper to show the occasion.

Mr. Barnes: Cross-examine.

Cross-examination.

By Mr. Parsons:

Q. As a matter of fact, Mr. Peoples, when Mr. James came to your office for the first time, that was days after he had been booked, was it not?

A. As I recall, it was two or three days, possibly the second or third day afterwards. I only met him in the office once.

Q. Can you tell us when that day was?

A. I wouldn't want positively to state. It was my understanding that it was a few days after he was booked.

Q. Now, was any slip signed, or any record made of the visit of James from a tank to your office?

[fol. 1507] A. No sir.

Q. No record of the movement of the prisoner was recorded?

A. We do not record when I call a man into my office.

Q. Now, upon this occasion that you state James came to your office, there was a newspaper reporter or photographer there, was there not?

A. Not the first time I talked to him.

Q. Then there was another time?

A. I think there was one other time that I asked him whether he wanted to have his picture taken, or something to that effect.

Q. There was an occasion when Mr. James came to your office, and there was a newspaper photographer there, and you asked Mr. James if he cared to pose for a photograph, and he said he did not?

A. That is right.

Q. And there was some little words passed between the parties there?

A. Between whom? To whom?

Q. The parties there present.

A. I do recollect there were some newspaper men in there. There was no particular argument. I think the gentlemen were trying to convince James that he should have his picture taken, and he said, "You have got enough pictures of me."

[fols. 1508-1509] Q. Did you take any part in the conversation?

A. I might have said—I don't remember directly, but I might have said, "James, it is better to have these pictures taken now, rather than have your jail pictures printed."

Q. Is that what you said?

A. I do not have police pictures taken in the jail.

Q. I did not mean that you did. Now, there were two men came to your office?

A. I remember that now.

* * * * * * *

[fol. 1510] Recross-examination.

By Mr. Parsons:

Q. What tank was he in at that time, at the time of this first visit concerning which you have testified?

A. "High-power", if I remember correctly. It was the "High-power".

Q. What number is that?

A. That is 12-A-1.

Q. 12-A-1?

A. Yes- 12-A-2 would be correct; the outside tanks are "1", and the inside tanks are "2".

* * * * * * *

[fol. 1511] Harry Dean, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Harry Dean.

Direct examination.

By Mr. Williams:

Q. Mr. Dean, what is your occupation?

A. Investigator for the District Attorney's office, Los Angeles County.

Q. You were such on the 19th, 20th and 21st——

Mr. Parsons: Will his evidence be similar to that—pardon me. Go ahead.

By Mr. Williams:

Q. —on the 19th, 20th and 21st days of April, 1936?

A. I was.

Q. Were you present at the time that the defendant, James, was arrested in his home at 3886 South LaSalle Avenue, Los Angeles?

A. I was.

Q. Who was present at that time?

A. Lois Wright, Mr. James' niece, the defendant, Mr. James, Investigators Southard, Charles Griffen of our office, and I believe you, yourself were present, Mr. Williams.

Q. Immediately following that, and after, were you in [fol. 1512] company of Mr. James from time to time, during the days of the 19th, 20th and 21st of April?

A. I was.

Q. Did you have conversation with him during that period?

A. I did.

Q. Did you hear others engage in conversation with him?

A. I did.

Q. Did you observe his manner, appearance and demeanor during the time that he was being questioned by yourself and others?

A. I did.

Q. Describe it?

A. He was about the coolest man I ever came in contact with.

Mr. Clark: I move to strike that out as not responsive, and calling for a conclusion of the witness.

The Court: The answer will be stricken.

A. He was very cool and collected.

By Mr. Williams:

Q. Did he at any time appear to be frightened?

A. Not a particle.

Q. Was his conversation rational or irrational?

A. Very rational; very much so.

Q. Was he coherent, or incoherent in his conversation?

A. Coherent; very much so.

Q. And were his answers responsive to the questions [fol. 1513] that were asked of him?

A. Yes, to all of them.

Cross-examination.

By Mr. Clark:

Q. Mr. Dean, you say you have been connected with the District Attorney's office how long?

A. A little over six years, Mr. Clark.

Q. Were you ever connected with that office on any prior occasion before that six years.

A. I am not the same Harry Dean, Mr. Clark.

Q. I thought I recognized you is why I asked you the question. Mr. Dean, during the time that you saw the defendant he was at a house adjoining the one he had formerly resided in?

A. The first time I saw him?

Q. Yes.

A. No, sir. I saw him in his own home the first time.

Q. That was at the time of the arrest?

A. Yes, sir.

Q. At that time, shortly after he was taken into custody, he was taken to an adjoining house, wasn't he? That is, he was told to go, and went? Is that right?

A. On the first occasion?

Q. Yes.

[fol. 1514] A. He was taken to the house we had been occupying.

Q. He was told to go there, told to come on?

A. He was invited to go and see the Dictaphones we had installed.

Q. And was he invited to go to the District Attorney's office subsequently?

A. He was under arrest. He was taken to the District Attorney's office.

Q. And when he was taken to the District Attorney's office he was seated in the office, wasn't he?

A. I don't know, Mr. Clark; I didn't go with him!

Q. Were you at the house when he returned?

A. No, sir, not that day.

Q. When did you next see him after he was taken to the District Attorney's office?

A. About 9:00 o'clock, I believe, on Monday night. The arrest was made Sunday morning.

Q. And you were with him from 9:00 o'clock until what time?

A. About 6:00 o'clock the next morning.

Q. You sat up all night that night, did you not?

A. I did.

Q. You didn't?

A. I did.

Q. Oh, you did. During that period from 9:00 in the evening until 6:00 in the morning, Mr. James did whatever [fol. 1515] he was told to do, didn't he?

A. We just sat there and talked most of the time.

Q. If he was told to do anything he did it, did he not?

A. There wasn't anything I know of that he was told to do.

Q. You were at work that night investigating the murder of Mrs. James, were you not?

A. I didn't have any definite instructions that particular night.

Q. During that night that you were sitting up, at that time was any one else sitting up with you?

A. Yes, there were numerous officers present.

Q. And who were they?

A. Investigator Davis from our office.

Q. Did he sit up all night, too?

A. Yes, sir.

Q. Any one else?

A. Deputy Sheriffs Gray and Killion were there, I believe, until midnight.

Q. Did they sit up all night, also?

A. No, they left about midnight. Investigator Southard was there.

Q. He went to bed rather early, didn't he?

A. Sir?

Q. He went to bed rather early, didn't he?

A. I couldn't recall just exactly when he did. It was [fol. 1516] around midnight or after. I am just guessing at that; I don't know. I believe—I know that Deputy District Attorney Williams was there, too, if I am not mistaken.

Q. How long did Mr. Williams stay?

A. I believe he stayed all night. I wouldn't swear to that.

Q. During that night various of the officers were asking the defendant questions, weren't they?

A. Yes—not the whole night, no.

Q. Was there any time that night when the conversation was not progressing?

A. Yes.

Q. How long?

A. I think it was around 3:00 o'clock that Mr. James went to sleep.

Q. Did he undress?

A. No.

Q. How long did he sleep?

A. I left around 6:00 in the morning. Some one came to the house; I don't know whether it was a newspaper reporter, or who it was, and rang the doorbell, and I think that is what woke up Mr. James.

Q. At the moment that he went to sleep some one was asking him questions, weren't they?

A. When he went to sleep?

Q. Yes.

[fol. 1517] A. We were talking until the time he did go to sleep.

Q. Was Mr. James taken anyplace besides to the District Attorney's office, so far as you know personally?

A. I couldn't answer that, Mr. Clark.

Q. I take it that that means that you have no personal knowledge of his being taken there?

A. No, I have not.

Q. When did you last see Mr. James before you saw him in court?

A. When I left the house on Tuesday morning I believe was the last time.

Q. Did you see him on the 2nd of May?

A. I don't reconcile that date at all, Mr. Clark, the 2nd of May.

Q. Did anybody strike him while you were there?

A. No, sir.

Q. Did you notice at any time his ears being swollen or bruised?

A. I never saw anything like that, no, sir.

Q. And you never saw any bruise on either of his ears?

A. I did not.

Mr. Parsons: That is all.

Redirect examination.

By Mr. Williams:

Q. Prior to Mr. James going to sleep, was anything said [fol. 1518] on the subject of sleep by anybody?

A. It might have been by myself, that I was getting groggy; that is all.

[fol. 1519] JOHN S. MARTIN, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.
The Witness: John S. Martin.

Direct examination.

By Mr. Williams:

Q. Mr. Martin, what is your occupation?
A. Investigator of the District Attorney's office.
Q. And you were such investigator on the 19th and 20th and 21st days of April, 1936?
A. I was.
Q. Do you know the defendant, Robert S. James?
A. I do.
Q. Were you in his company at any time on the days I have mentioned?
A. Yes, sir.
Q. For what period of time and when?
A. I was with him Sunday night, the 19th of April, until about 4:30 Monday morning, and I was with him Monday afternoon, most of the afternoon, and Monday evening until about 9:00 or 9:30.
Q. During the time that you were with him was any force or violence used upon him?
[fol. 1520] A. There was none.
Q. Any offers or promise or hope of immunity or reward extended to him?
A. There was not.
Q. And did he have a conversation with you during that period of time?
A. Yes, sir.
Q. And there were others in your presence?
A. There were.
Q. What would you say as to his manner and demeanor and appearance during the time that he was with you?
A. He was very cool and calm.
Q. Did he appear at any time to be frightened?
A. No.
Q. Did he make any complaint to you about having been injured by any person during that time?
A. Monday evening he told me that Southard had slapped him.

Q. Did he make any other complaint?

A. He did not.

Q. At the time that he told you that Southard had slapped him, did he appear to be frightened?

A. No.

Q. Were the answers which he made to you coherent and responsive to the questions that you asked?

A. They were.

[fol. 1521] Q. Did you have any conversation with him on the subject of a hernia?

A. I did.

Q. When did that conversation take place?

A. Sunday night.

Q. What did he say?

A. We were questioning him about the incident that happened in Colorado and he told us about the car going over the bank and about the car and his wife were down some 200 feet and he went down about 50 feet and fell out of the car. Mr. Cavett asked him if he received any injuries in the accident himself and he said he received a hernia.

Mr. Williams: You may cross examine.

Cross examination.

By Mr. Parsons:

Q. When was it that you discussed that phase of your proposed testimony with anybody?

A. What?

Q. When, referring——

The Court: Well, the question assumes something not in evidence.

By Mr. Parsons:

Q. Have you ever discussed your testimony here with anybody at all?

A. What do you mean?

Q. Well, I will try and make it plainer. Have you ever, [fol. 1522] prior to taking the witness stand, discussed your proposed testimony here with any human being?

A. Not testimony. I reported the next morning to Mr. Griffen the conversation during the night.

Q. Did you report that in writing?

A. No.

Q. As a matter of fact, Mr. James told you that he had had a scuffle with Griffen too, did he not?

A. No.

Q. Did you see anybody hit James?

A. I did not.

Q. And now, you arrived on the night of the 19th, is that right?

A. That is right.

Q. About what time?

A. About 7:30.

Q. And where was James when you saw him?

A. Sitting in a chair in the front room.

Q. And that chair is the same chair that he continued to occupy until he was taken from the house and booked, except for short intervals, isn't that right?

A. Well, he occupied two different chairs while I was there.

Q. He occupied two different chairs while you were there?

A. Yes, sir.

Q. In the front room?

[fol. 1523] A. Yes, sir.

Q. And from the time that you arrived Sunday night, how many hours elapsed before you left?

A. I left there about 4:30 Monday morning.

Q. You left there about 4:30 Monday morning?

A. Yes, sir.

Q. And who was in the house between 7:30 Sunday night and 4:30 Monday night?

A. Well, Tom Cavett was there and Charlie Griffen and Jack Southard and Everett Davis. That is all I recall.

Q. And during the time that Mr. James was sitting in the room, Sunday night or Monday morning, there was conversation going on, is that true?

A. That is true.

Q. Practically all the time?

A. That is right.

Q. And you left at 4:30 or thereabouts, Monday morning, and when did you return?

A. I took Mr. James back to that house Monday evening about 7:00 o'clock.

Q. Where did you pick him up at?

A. At the District Attorney's office.

Q. And how long were you there upon that occasion?

A. Until about 9:00 o'clock.

Q. Until about 9:00 that evening?

[fol. 1524] A. Yes, sir.

Q. And did you then leave?

A. I did.

Q. Did you see him again after that, after he was booked?

A. I never did.

Q. And during the time that you were there between 7:00 and 9:00, there was conversation going on, was there not, with Mr. James and those present?

A. There was.

Q. And he was again at that time seated in the chair, was he?

A. Yes sir, that is right.

Q. It is a fact, that any time that you were in the house on La Salle Street, you didn't see Mr. James slapped?

A. No sir, I did not.

Q. Did you see him take his clothes off at any time while you were there?

A. Yes, sir.

Q. Did he take a shave at any time between the time he was arrested and the time he was booked?

A. Not in my presence.

Q. Well, when you saw him Monday, he had a growth of beard, did he not?

A. Well, I wouldn't say positively.

Q. You wouldn't say?

A. No, sir.

[fol. 1525] Q. Did you observe his face?

A. I wouldn't say whether he had a shave or not; I don't know.

Q. Did you look at his ears and notice his ears, and notice whether they were red or not?

A. Nothing that I noticed; I didn't examine them.

Q. You didn't look at his head closely?

A. Not closely, no sir.

Q. And was Mr. Griffen there during the time that you were there?

A. Mr. Griffen was there Sunday night, yes.

Q. Was he there Monday night?

A. I think he arrived just a few minutes before I left Sunday night.

Mr. Parsons: That is all.

Redirect examination.

By Mr. Williams:

Q. Before you took the defendant to the house on La Salle Street from the District Attorney's office, did you take him any place else?

A. I did.

Q. Where did you take him?

A. I took him to Alex's Cafe, just went off Broadway on Temple Street.

Q. And what did the defendant do there?

[fol. 1526-1629] A. We had dinner.

Q. Do you remember what he had?

A. T-bone steak, potatoes and coffee and bread and butter.

Mr. Williams: That is all.

Recross examination.

By Mr. Parsons:

Q. What time was that, Mr. Martin?

A. We left the office about 6 o'clock and went to Alex's Cafe.

Q. Which cafe?

A. Alex's Cafe.

Q. Alex's Cafe?

A. Yes, sir.

Q. On Temple Street?

A. That is right.

Q. Do you know who served you?

A. I couldn't say.

Mr. Parsons: That is all.

Mr. Williams: That is all.

* * * * * * *

[fol. 1630] Alfred Dinsley, called as a witness in behalf of the Defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Alfred Dinsley.

Direct examination.

By Mr. Clark:

Q. During the month of last August, where did you live? [fol. 1631] A. At 4242 Verdugo Road, El Canada.

Q. And do you know where your residence—by the way, you are still living there?

A. Yes, sir.

Q. And do you know where that residence is located with reference to 1329 Verdugo Road?

A. Well, I would describe it as a northern angle of a rectangle.

Q. As I understand, four houses are on the same piece of property, is that right?

A. Yes, the same property.

Q. And there are some two or three houses on the same parcel, as I gather it?

A. Yes, sir.

Q. Now, you have been in attendance upon the court here and have seen the maps and diagrams?

A. I have seen one diagram, Mr. Clark.

Q. Do you understand that diagram that is marked People's Exhibit 2, I believe it is here? This is supposed to be a diagram of the premises at 1329 Verdugo Road, the house being shown at the extreme lower end of the map, which is south.

A. Yes, sir.

Q. And the other premises being shown in the rear?

A. Yes, sir.

Q. Directing your attention to the chicken houses and chicken yards was there any place where you had a clear [fol. 1632] view from other parts of the land of those buildings?

A. I rarely came beyond here, but there was a clear view right through here down to here.

Q. Thank you.

Mr. Williams: May we have it indicated for the purpose of the record?

The Court: The upper portion of the diagram, indicating the northerly portion of the premises, approximately down the line of the center of the diagram toward the south to the point marked "gate" and down the place marked

"walk" to the place again marked "gate," to the place still further toward the south or lower part of the diagram to the point where the concrete walk ends just north of the table, referring to the concrete platform and the table outdoors.

Mr. Clark: Now, directing your attention to Monday, the 5th day of August, 1935, was your attention directed to those premises at any time that morning?

A. About 9:25.

Q. Where were you at that time?

A. May I use the diagram?

Q. You may.

A. If I had a blackboard I could show it better. The property in which I live is here and here.

Q. Indicating the northerr margin of the diagram.

A. From about where the north indication is. I understand 512 feet right through. I live 60 feet this way.

[fol. 1633] Q. 60 feet to the west?

A. Yes. And at one time in this north east corner—or north west corner there used to be a shed in which I stored laboratory apparatus and I was almost a daily visitor there. If I wished to check up on any chemical work or research work I was doing, I would go down there.

[fols. 1634-1663] On August 5th I went down there and took some household garbage that was combustible. This diagram is wrong—oh, no, I beg your pardon. The shed was here. I came here and took the garbage and went straight down this path to the incinerator. This incinerator was for Dr. Billings, myself, and the James property.

Mr. Clark: Now, looking over at the property, the James property, 1329 Verdugo Road, at that time what did you do?

A. As soon as I left the small shed with my burning stuff, stuff to be destroyed, as I came down and was about to branch off to the incinerator, what attracted my attention was a pit bulldog inside this gate.

Q. That is, inside the gate on the James premises?

A. Yes.

Q. Thank you.

A. This dog attracted my attention, and in this chicken-house, in the door of the chicken house there was a body, a part of a female hanging out. The dog barking attracted her attention. She came out, stared me full in the face,

half smiled, then resumed her duty, and I carr-ed on with mine.

Mr. Clark: You may cross examine.

Mr. Williams: No questions.

* * * * * * *

[fol. 1664] ALFRED DINSLEY, resumed the stand and testified as follows:

Direct examination.

By Mr. Parsons:

Q. Now, Mr. Dinsley, you have stated that about 9:25 or 9:30 on the morning of August 5th last year you saw a [fol. 1665] woman in the vicinity of the chicken yard on the James premises at 1329 Verdugo. Now, briefly describe that woman to the jury. How tall was she approximately.

A. At the distance from the place where I was standing I would say 5 foot 8 or 5 foot 9.

Q. Can you tell us the color of her hair?

A. Blonde.

Q. Blonde?

A. Yes, sir.

Q. And can you say whether the woman was young or old?

A. She was mature.

Q. She was mature?

A. Yes, sir.

Q. And is that as far as you can go?

A. Yes.

Q. Now, I will ask you whether or not approximately she was 30 or 35 years of age?

A. Mr. Counsel, at the range of 25 feet it is impossible to tell the age of a woman, even at short range.

Q. Well, I grant you that.

Mr. Clark: The witness is a good observer.

Mr. Parsons: Excuse me for smiling. It was not at you, but at my own questioning.

A. All right.

Q. Now, have you observed upon the James premises prior to that time, a woman similar in appearance to the

[fol. 1666] woman whom you observed out by the chicken coop?

[fol. 1667] A. Only insofar as that at the greater distance, as can be seen demonstrated by this diagram, I had seen a female, obviously not a man.

* * * * * * *

Mr. Parsons: Yes, I will go at it in a little different fashion.

Q. Prior to August 5th, 1935, had you seen a woman upon the James premises before, within say a month or two prior to the occurrence that you have related?

A. I had, but at a much greater distance.

Q. How many times had you seen a woman on the James premises within a month or two prior to the occurrence on August 5th, 1935?

[fol. 1668] A. Approximately four or five occasions.

Q. Now, will you tell us whether or not there was any similarity?

The Court: Well, just before you get to that, let's find out whether or not on the four or five occasions it was the same woman.

Mr. Parsons: Yes.

Q. Now, this woman whom you saw upon the four or five occasions, Mr. Dinsley, prior to August 5th, did it appear to you to be one and the same individual?

A. Mr. Counsel, that I cannot say.

The Court: Did it, or didn't it?

By Mr. Parsons:

Q. The question is did it appear to be? Was she similar in appearance?

A. In general appearance, yes.

Q. Similar in general appearance?

A. Yes.

Q. A blonde, was she?

A. At the distance which she was standing from me on the prior occasions, I couldn't tell you whether she was a blonde, brunette, or a composite of the two.

Q. Now, from seeing the woman four or five times upon the premises, and the woman whom you saw on August 5th, could you tell us whether or not there was any similar-

ity between the person whom you had seen previously, and the person whom you saw on the morning of August 5th? [fol. 1669] A. There would be some similarity.

Q. Would you say the woman whom you had seen before was of the same general appearance?

Mr. Williams: Just a moment. I think on a matter of this sort the witness should not be led, if your Honor please.

The Court: I think I will ask the witness this question, myself: Will you state what similarities there were between the woman you saw on August 5th, and the woman that you saw on any or all of the former occasions?

A. Yes, sir, your Honor. In all cases the party was wearing a female dress, and had all the characteristics of a female. Beyond that I cannot go.

By Mr. Parsons:

Q. Now, how was this woman dressed on the morning of August 5th, if you recall?

A. She was bareheaded, and wore a rose or rust-colored smock, her stocking legs were visible to below the knee, and she apparently was wearing woman's shoes.

* * * * * * *

[fol. 1670] The Court: I will ask the witness: Did you ever see a woman who was pointed out to you, or to whom you were introduced, as Mrs. James?

A. Never, sir.

Mr. Clark: Your Honor's question clarifies the situation.

The Court: I think so. I would like to ask the witness one more question: You used the term "smock". Some men are able to correctly name women's garments, and some are not. Can you describe just what you mean by "a smock", or describe the particular smock as to character?

A. Yes, your Honor. I assume it was a smock, because it was belted at the waist, and obviously not of the pajama or divided skirt type of garment.

* * * * * * *

The Court: In other words, the garment seemed to be merely a coat-like garment?

A. Just a typical wife's covering. On bending the posterior part of the garment was elevated, naturally.

The Court: So you could see above the knees?

[fol. 1671] A. Yes, sir.

The Court: Did you get a full view of this person?

A. Yes, a full view.

Q. Can you recall did you observe whether this garment, this smock, was fastened in the front or in the back?

A. No, sir.

Q. In other words, you can't tell whether it was open in the front?

A. No, sir. It may have been a pull-over.

The Court: Proceed.

Mr. Parsons: That is all, Mr. Dinsley, thank you.

Mr. Williams: I have no questions. Captain Southard, will you take the stand.

J. C. Southard, recalled as a witness in behalf of the People, having been previously sworn, testified as follows:

Direct examination.

By Mr. Williams:

Q. Captain Southard, during any of the time that Mr. James was in the presence or company of Mr. Fitts, when you were there, did Mr. Fitts say to him anything to the effect that he had better clear up the whole thing to save expense?

A. He did not.

Q. Now, I observe on Page 1096 of the transcript, line 21 to 24, inclusive, a question and answer. I wish you [fol. 1672] would read those. Now, it appears from the transcript that in response to a question asked by Mr. Clark, you testified as follows: "Q.—Did Mr. Fitts say to him, in substance, that he had better clear the whole thing up and save a lot of expense? A.—No, sir, not at that time. That was in this case here."

Did you understand that you were testifying to the effect that Mr. Fitts had made such a statement?

Mr. Clark: Just a moment. That is objected to as leading and suggestive.

The Court: I think it was covered by the previous answer that there was no such statement made.

Mr. Williams: Yes.

Q. Now, did you at any time during the 2nd and 3rd days of May, 1936—were you at any time during those days alone with Mr. James?

A. I have never been alone with Mr. James.

Q. Yes. Now, did you on or about 10:00 o'clock p. m., on the 2nd day of May, 1936, while James was sitting at a desk there in Mr. Fitts' office, or the office next to it, or at any place, or at any time, say to James in substance: "You have been sitting here lying to Fitts all evening just like you lied to me when I had you out at the house. I didn't have the dope on you then, but I have got it on you now. You are going to tell the truth here now or I am going to take you back to that house and I am going [fol. 1673] to beat your God damned head off"? Did you say that?

A. I did not.

Q. Or any part of it?

A. I did not.

Q. And did he, in response thereto, or at all, or at any other time, tell you that he was ill from being beaten up before, that he would say what you wanted him to say, rather than take other punishment?

A. He did not. He made no such statement.

Q. Or any part of such statement?

A. He did not.

* * * * * * *

[fol. 1674] Cross-examination.

By Mr. Clark:

Q. Mr. Southard, were you present when the defendant was booked?

A. I booked him, yes.

Q. Now, where did you take him in the County jail on that occasion?

A. I wouldn't be positive, Mr. Clark, but I believe at Room 672, the Bureau of Investigation of the District Attorney's office.

Q. And who went with you?

A. Captain Kynett of the Los Angeles Police Department.

Q. Did he come through the County jail?

A. That is the best of my recollection, yes.

Q. Now, as a matter of fact, on the day that Mr. James was booked, you started with him in the first place from the house adjoining his residence, where you had detained him, didn't you?

A. I did not, no, sir.

Q. Isn't it a fact that he was taken from that house to the building we are now in, in your car?

A. On what date, Mr. Clark?

Q. On the day he was booked, Tuesday.

A. No, sir. The only day he was ever in my car was the day that he was arrested.

Q. Did you accompany him on that day from the house in question to the Hall of Justice, either in your own car, or in anybody's car?

A. No, sir.

Q. Now, didn't James ask you on the way between that house and this building what you were going to charge him with?

A. That was on the morning of April 19th.

Q. Whatever date it was, you and Mr. James were entirely alone on that occasion, were you not?

A. We were not. Charlie Griffen was in the car. Mr. James was in the back seat.

Q. At any rate, it is entirely accurate, is it not, to say that your work in investigating this offense that is charged against the defendant here continued right along from the time the defendant was arrested until he was booked at the County jail?

A. May I have that question again, please?

(Question read by the reporter.)

Q. It is entirely accurate, is it not, to say that your investigation of this offense that is charged here, continued right along from the time the defendant was arrested until he was booked at the County jail?

A. That is a hard question to answer just that way, Mr. Clark.

Q. Well, answer it, and then if any explanation is necessary in order to make your answer entirely clear and [fol. 1676] understandable, give the explanation.

A. I worked on the case straight through, but the first of the case I had to clean up the other charge, and then continue on with the murder case.

Q. In other words, although you were working on this offense, on this charge, you were working upon another at the same time, is that what you mean?

A. Maybe I can explain it better this way, that while I was working on this case I ran into the other case.

Q. That, however, doesn't give any explanation.

The Court: I don't think the witness has gotten your idea, Mr. Clark. Mr. Southard, shortly after the arrest of the defendant, regardless of what may have been said about any other charge, was the subject of the death of his wife brought up in the conversation on the 19th?

Mr. Clark: No, if your Honor will pardon me, that is not the scope of my question.

The Court: This is merely a preliminary question.

Mr. Clark: Pardon me.

A. Not that I recall, your Honor, on the 19th.

The Court: Well, at that time were you engaged in investigation to determine the possible cause of the death of Mrs. James?

A. Yes, I was, your Honor.

Q. And did your part in that investigation, whether it be large or small, continue up to the time that you had Mr. [fol. 1677] James booked?

A. It did.

Q. And beyond that?

A. And up to the present date.

Mr. Clark: Mr. Littleton, Mr. Martin and the other investigators that were out to the house, were working in part under your direction, were they not?

Mr. Barnes: We think that is somewhat leading, your Honor.

The Court: Objection overruled.

A. They were.

By Mr. Clark:

Q. Now, I wish you would tell us, including any efforts to get a confession from Mr. James, what was done out

at that house in the course of the investigation of this crime, after the defendant was taken into custody, and before he was booked at the County jail?

The Witness: May I have that question, please, Mr. O'Brien?

(Question read by the reporter.)

Mr. Williams: I take it by "this crime" he means the crime for which the defendant is now on trial?

Mr. Clark: The charge of murder.

A. On the evening of the 19th of April Mr. James was brought back to the house at 3882 South LaSalle. I don't recall who took him back out. Charlie Griffen and I rode out together in my car. We went to bed.

Mr. Williams: Just a moment. If your Honor please, this is obviously going over matters that have already [fol. 1678] been covered.

The Court: It appears to me that the question almost answers itself. Was there any work done on the James case, other than the conversation you had with Mr. James at this house? I am referring to the homicide, or possible homicide charge.

A. Do you mean, your Honor, did we do any other work besides the homicide out there at that house?

The Court: Did you do any work in connection with the homicide charge, other than talking to Mr. James, and I am limiting the question now as to what was done at that house.

A. No, that was all that was done out there.

Mr. Clark: That is all.

Mr. Williams: That is all, your Honor. Mr. Killian.

Willard L. Killion, recalled as a witness in behalf of the People, having been previously sworn, testified as follows:

Direct examination.

By Mr. Williams:

Q. Mr. Killion, on the morning of the 2nd of May, 1936, did you go up to the County jail?

A. I did.

Q. Did you there see the defendant?

A. Yes, sir.

[fol. 1679] Q. Was there anybody with you when you first saw the defendant?

A. No, sir, not in my immediate company.

Q. And where did you see the defendant?

A. In the attorney's room at the 10th floor of this building.

Q. When you first saw him did you have any conversation with him?

A. No, sir, other than "Hello, James", or "Hello, Bob".

Q. Then did you take the defendant any place?

A. I did.

Q. Where did you take him?

A. Down a corridor, along a cell block that leads from the attorney's room into a room that is known as the Chaplain's room, in the same building, and on the same floor.

Q. Now, from the time you first saw the defendant and said "Hello" to him, down to the time he arrived in the Chaplain's room, did you or any other person have any conversation with him?

A. No, sir.

Q. When you got into the Chaplain's room was there anybody there?

A. Yes, sir.

Q. Who?

A. You were there, and Deputy Gray, and Edward [fol. 1680] Lynch, and Charles Griffen and Southard. As I recall it, that is all the persons who were there.

Q. Now, was there a time when Mr. Hope came into the room?

A. Yes, sir.

Q. Was that before or after James came in?

A. As I remember it, Hope was brought into the room by Southard after I was there with James.

[fol. 1681] Q. And up to the time that Mr. Hope came into the room, was there anything said to James by any person?

A. No sir, there was no conversation.

Q. Do you remember who made the first statement that was made in the room after James got there?

A. I do.

Q. Who made it?

A. You did.

Q. When I made a statement were there statements also made by the defendant?

A. Do you mean following your statement?

A. *Yes.*

A. Yes, he spoke.

Q. Now at the time, or prior to the time that I made statements to the defendant and he made responses, was there any force or violence used on him by you or anybody else?

A. No, sir.

Q. And were there any offers or promises or hope of immunity or reward extended towards him?

A. There were not.

Q. Any threats made?

A. No, sir.

Q. Were all statements made by him freely and voluntarily made?

A. Yes, sir.

Q. And following the taking of that statement what happened to the defendant, James?

[fol. 1682] A. He was taken back to where I had gotten him before that.

Q. Who took him back?

A. I did.

Q. And did anybody have any conversation with him on the way back to the place where you had gotten him?

A. No, sir.

Q. He was then returned to his tank?

A. Yes, sir.

Q. Thereafter, during that day, did you see the defendant again?

A. I did.

Q. Prior to seeing him did you obtain a court order?

A. I did.

Q. Where did you see the dependant after you obtained the court order?

A. In the county jail.

Q. Did you take him out of the county jail?

A. I did.

Q. Who was with you?

A. No one was with me at the time I took him from the jail.

Q. Thereafter, did somebody join you?

A. Virgil Gray.

Q. Where did you take the defendant?

A. To La Canada.

Q. And when he was out there were other persons present?

[fol. 1683] A. Many.

Q. And then from La Canada, where did you go?

A. Back to this building, to the District Attorney's office.

Q And did you continue in the company of Mr. James during the entire time that he was going to La Canada and returning from La Canada?

A. I did.

Q. And then after he got into the District Attorney's office did you stay in his company?

A. Yes, sir.

Q. And did you stay in his company during the entire balance of the day and night until he was returned to jail?

A. I did.

Q. Were there others there from time to time?

A. Yes, sir.

Q. Was he questioned?

A. Yes, sir.

Q. Did he make responses?

A. Yes, sir.

Q. Did he, during that period of time have anything to eat to your knowledge?

A. I know he did.

Q. Did he go any place except to the District Attorney's office? Did he got out of the District Attorney's office?

A. Yes, sir.

[fol. 1684] Q. In whose company?

A. He went out of the District Attorney's office in the company of Gray and myself and Everett Davis and Carmen Wastengs.

Q. When you went out of the office, where did you go?

A. We went to a restaurant at 5th and Figueroa in Los Angeles.

Q. And did the defendant there have food?

A. He did.

Q. He ate it?

A. Yes, sir.

Q. Then after he finished eating, did you have a conversation with him?

Q. There after was he taken back to the District Attorney's office?

A. Yes, sir.

Q. And after he got back to the District Attorney's office was a statement taken from him?

A. It was.

Q. Questions asked of his and answers given by him?

A. That is correct.

Q. And that continued up until about what time?

A. Well, it started approximately 1:00 or 1:30 in the morning—let's see, that would have been Sunday, May the 3rd and it must have finished at about 3:00 o'clock.

[fol. 1685] Q. Thereafter what was done with the defendant?

A. I took James back to the county jail.

Q. Now, during the entire time that you were in his company, did he at any time give the appearance of being afraid?

A. Absolutely not.

Q. What was his manner and demeanor and appearance during that time?

A. Well, the same as it has been on all occasions that I have observed him, that he was cool and collected and seemed to show no emotion of any kind.

Q. Were his answers responsive to the questions which were asked of him?

A. Yes, sir.

Q. Was he rational or irrational in his conversation?

A. Rational.

Q. Was he coherent or incoherent?

A. Coherent.

Q. During that entire time was there any force or violence used upon him?

A. No, sir.

Q. Any threats made?

A. No, sir.

Q. Any offers or promise or hopes extended of immunity or reward?

A. There were not.

[fol. 1686] Q. Were all statements during that time made freely and voluntarily?

Mr. Clark: That is objected to upon the ground it calls for a conclusion of the witness, no foundation has been laid therefor.

The Court: Objection overruled.

A. Yes, sir.

Mr. Williams: You may cross examine.

Cross-examination.

By Mr. Clark:

Q. Now, Mr. Killion, this occasion when you were in the Chaplain's room, was the 2nd of May, I believe, was it not?

A. It was.

Q. You took the defendant to the room upon that occasion pursuant to some plan which had been made before that, didn't you?

A. Yes.

Q. That plan was done between you and some of the investigators of the District Attorney and Mr. Williams, was it not?

A. Yes, sir.

Q. You knew that Mr. James at that time was represented by Mr. Silverman here, didn't you?

A. Yes, sir.

Q. You didn't inform Mr. Silverman that you wanted to see his client, did you?

[fol. 1687] Mr. Williams: That is objected to as immaterial, if your Honor please.

The Court: Sustained.

Mr. Clark: You didn't ask Mr. James if he wanted Mr. Silverman present, did you?

Mr. Williams: Objected to as immaterial.

The Court: Overruled, he may answer.

A. I did not.

Mr. Clark: Neither did anyone else that you know of, did they?

A. Not that I know of.

Q. Mr. Silverman wasn't there, was he?

A. He was not.

Q. Neither was any of Mr. James' personal friends that you know of, was there?

A. I don't know.

Q. The entire purpose of taking Mr. James to the Chaplain's room was obtain something by silence or admission that could be used to prosecute him with, wasn't it?

Mr. Williams: That is objected to as calling for a conclusion of the witness.

The Court: Objection sustained.

Mr. Clark: May I say to your Honor that I have, I think, heretofore asked two or three questions of a similar character that your Honor has sustained objections to, and I [fol. 1688] think I have your Honor's theory sufficiently in mind that I may say to your Honor that I will not purposely ask another question of the same kind.

* * * * * * *

Q. Now, after getting in the Chaplain's room there with Mr. James no one did any talking except Mr. Williams, did they?

A. That is true.

Q. Mr. Williams addressed himself to Mr. James, didn't he?

A. That is right.

Q. And he didn't tell James what the effect of Mr. James remaining silent might be, did he?

[fol. 1689] Mr. Williams: That is objected to as calling for a conclusion of the witness.

The Court: Sustained.

By Mr. Clark:

Q. He didn't make any statement to Mr. James as to whether or not silence on Mr. James part might be used against him?

Mr. Williams: Objected to as calling for a conclusion of the witness.

The Court: The same ruling.

Mr. Clark: He didn't tell Mr. James that he was at liberty to speak or not, as he saw fit, did he?

A. He didn't use those words, no sir.

Q. He didn't say anything to that substance or effect, did he?

Mr. Williams: That is objected to as calling for a conclusion as to what the effect is.

Mr. Clark: If we have to prove the exact words then all testimony in regard to conversations might as well be stricken out and omitted.

The Court: You may answer.

(Question read by the reporter.)

A. After he had made a statement to Mr. James he asked Mr. James if he had anything to say about it.

By Mr. Clark:

Q. And that is all?

A. That is all.

Q. Now, did you take Mr. James back to his tank?

[fol. 1690] A. I took him back into the attorney room.

Q. By the way, the attorneys room has a door where there is a turnkey that leads to the tank where Mr. James was confined, isn't that true?

A. That is true.

Q. And when you left the attorneys room you turned him over to one of the turnkeys there?

A. I delivered him over to one of the turnkeys.

Q. And now, after doing that you continued working upon your investigation of this charge, didn't you?

A. Yes, sir.

Q. And to that end, you went over and had some conference at the District Attorney's office next, did you?

A. As I recall, I did go to the District Attorney's office after leaving the jail.

Q. It wasn't until after you had gone to the District Attorney's office that you procured the Court order, that is true, isn't it?

A. That is true.

Q. Mr. Williams was present when you procured the court order, wasn't he?

A. Yes, I believe he was, or a short time he had been.

Q. Mr. Silverman was not present?

A. He was not.

Q. And so far as you know, Mr. Silverman was not notified that any such application was going to be made?

[fol. 1691] Mr. Williams: Objected to as immaterial.

The Court: Sustained.

By Mr. Clark:

Q. What time of the day was it that you procured your court order?

A. Well, it was about noon time. I cannot say within an hour or so, but it was near the noon hour.

Q. And about what time of day was it that you started for La Canada?

A. Very shortly thereafter.

Q. And by the way, who accompanied you on that trip?

A. Mr. Gray and Mr. James and myself were the only persons in my automobile.

Q. Did any other automobile accompany yours?

A. No, sir.

Q. About what time did you return?

A. About the middle of the afternoon.

Q. And where did you take the defendant upon your return?

A. To the District Attorney's office.

Q. Then you were then in the District Attorney's office, according to your best recollection about three or four o'clock in the afternoon?

A. That is a very close estimate.

Q. And you remained there, did you, continuously until 3 o'clock the next morning?

A. About that—oh, yes, not continuously. I will have to change that answer if you said "continuously", because I [fol. 1692] was away during that time for an hour and a half.

Q. Of course, you being away, could have no personal knowledge during that hour and a half of what went on in the District Attorney's office?

A. No, you misunderstand me. He was away with me at that time.

Q. But you and the defendant were at the District Attorney's office for about an hour and a half?

A. Yes, sir.

Q. Was anyone with you?

A. Yes sir, I have named them.

Q. I see. There is no necessity for repeating it. And it was not until about 1 o'clock that the defendant began giving the answers that have been referred to here as constituting a confession?

A. You mean the answers in the deposition or in the restaurant or——

Q. No, I mean in the District Attorney's office.

A. It must have been about 1:30 in the morning.

Q. However, most of the time that he was there, questions were being asked him, were they not?

A. Most of the time.

Q. And to quite a number of the questions, he gave no answers, isn't that true?

A. I don't believe that I could say quite a number. There may have been a few questions that he did not reply to.

[fol. 1693] Q. And didn't he, on one occasion ask if he couldn't have a chance to ask his attorney whether he should answer questions or not?

A. Yes, he did.

Q. And he was told that his attorney could not be present, wasn't he?

A. No, sir.

Q. What was he told?

A. Shall I explain what happened?

Q. Just tell what he was told and then if it requires any explanation, let that follow the answer.

A. He was told that we were attempting to get in touch with Mr. Silverman.

Q. And later he was told that you couldn't get in touch with Mr. Silverman, wasn't he?

A. A short time later, after attempting from the telephone conversation that we had with another person——

Q. Well, at any rate, you didn't get hold of Mr. Silverman?

A. That is correct.

Q. And your information was that he could not be reached?

A. Not exactly. It was to the effect that he was in Murrieta Hot Springs.

Q. The questioning was not discontinued until Mr. Silverman got back though?

A. No, it was not.

[fol. 1694] Q. And it was communicated to the defendant that Mr. Silverman was at Murrieta Hot Springs, was it not?

A. Yes, the defendant was present during the telephone conversation.

Q. Mr Fitts told him that, didn't he?

A. Yes.

Q. And then the defendant told Mr. Fitts that he would have Mr. Parsons present?

A. Well, he asked for an attorney he had in a case. He didn't know his name.

Q. And no attempt was made to communicate with that attorney at that time?

A. Yes, we made inquiry as to who that attorney could be and finally determined that it was Mr. Parsons that Mr. James was asking for.

Q. Was Mr. Parsons communicated with?

A. No, sir.

Q. Now, how near the 22nd of April did you see Mr. James, according to your recollection, having in mind that we have been talking about the 2nd and 3rd of May?

A. I saw him on Monday night, following the 19th of April, which would have been the 20th of April.

Q. You saw him the 20th of April?

A. Yes, sir.

Q. And did you see him two or three days after that again?

A. I didn't see him again until May the 2nd.

[fols. 1695-1696] Q. Did you notice his ears being swollen and bruised on either of those occasions?

A. I didn't notice anything about that on the 20th of April and on the 2nd of May I noticed there was some discoloration of his left ear.

Mr. Clark: That is all.

Mr. Williams: That is all. Mr. Lynch.

* * * * * * *

[fols. 1697-1698] C. W. Maples, called as a witness in behalf of the Defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. C. W. Maples.

Direct examination.

By Mr. Parsons:

Q. Speak up so that we can all hear you.

A. C. W. Maples.

Q. And what is your business?

A. Chief Clerk of the County Jail.

Q. A Deputy Sheriff of Los Angeles County?

A. Yes, sir.

* * * * * * *

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Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940 41

No. 1334

MAJOR RAYMOND LISENBA, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED JUNE 8, 1940.

CERTIORARI GRANTED OCTOBER 28, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 133

MAJOR RAYMOND LISENBA, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

VOL. II

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[fol. 1699] EDWARD F. LYNCH, resumes stand.

Direct examination.

By Mr. Williams:

Q. Mr. Lynch, immediately prior to your being excused from the witness stand the other day, I asked you a question to which an objection was made, and I will now repeat that question for your information: "Turning to your notes and using them for the purpose of refreshing your recollection, will you state at this time who were present and what was said on that occasion?" That is referring to the occasion in the county jail on the 2nd of May, 1936, at about 11:45 A.M.

Mr. Clark: Just a moment. May I have that question, Mr. Reporter?

(Question read by the reporter.)

Mr. Clark: That is sufficient. To which we object on the ground that the question calls for evidence for which no foundation has been laid for its introduction in any of the following respects: In the first place, it is an attempt upon the part of the prosecution to prove the corpus delicti by the statements, declarations and admissions of the defendant, that no foundation has been laid by proving the corpus delicti other than by such statements, declarations and admissions. There has been a further failure to lay a foundation, in that it has not been shown that the defendant at that time was free to speak, or not, as he chose, but it [fols. 1700-1705] affirmatively appears from the evidence of the prosecution, itself, that he was not. I think those are the grounds of the objection. I had hoped that this question would not be re-asked until our rebuttal of the voir dire testimony counsel has produced was complete.

* * * * * * *

[fols. 1706-1707] WILLIARD L. KILLION, recalled as a witness in behalf of the People, having been previously sworn, testified as follows:

Direct examination.

By Mr. Williams:

Q. Mr. Killion, when Mr. James suggested that he would like to have some attorney present, Mr. Parsons, there was an effort made to get in touch with Mr. Parsons?

A. Yes, sir.

Q. And did you get in touch with him?

A. We were not able to.

Q. Now, thereafter did Mr. James say anything that he didn't want to proceed without an attorney being present?

Mr. Clark: That is objected to as incompetent, and leading.

The Court: Overruled.

A. No, sir, he didn't say that.

By Mr. Williams:

Q. Did he thereafter ask for another attorney?

A. No, sir.

Mr. Williams: That is all.

Mr. Clark: That is all.

* * * * * * *

[fol. 1708] The Court: Let the record show, Mr. Reporter, that the Court, after hearing the argument of counsel, has arrived at the conclusion and expresses the opinion that there is nothing in the record to sustain the conclusion that the declarations of the defendant in Mr. Fitts' office, or the transaction involving what has been referred to as the accusatory statement, or the response to the statement of Hope by the defendant——

Mr. Clark: If your Honor please, I am called out of the courtroom. And if counsel will represent the defendant in my absence——

The Court: There is nothing in either of these instances or the circumstances preceding them that warrants the conclusion that the defendant's conduct was involuntary or that it was not voluntary. I may say to counsel also, that

the Court has taken occasion, when it appreciated this question was coming up, to review not only the cases which have been cited here, but the body of the cases of California. And while it is true that we can't find the proverbial all fours case, in other words, another black and white cow upon a single railroad track, nevertheless the principles of law I think are very definitely stated and very definitely found.

* * * * * * *

[fol. 1709] EDWARD F. LYNCH, recalled as a witness in behalf of the People, having been heretofore duly sworn, testified as follows:

The Court: The record will show that the jury has returned into the box and the defendant's counsel are now in court and Mr. Lynch is now returned to the witness stand.

Mr. Williams: In order to save time——

Mr. Clark: May I ask counsel to approach the bench for a moment?

Mr. Williams: Yes, you may.

(Conference at bench.)

The Court: Let the record show that during the recess, the question as to the admissibility of certain evidence already indicated, relating to declarations and statements and the conduct of the defendant in the county jail and in the District Attorney's office, have been ruled upon by the Court, as to the admissibility of that, the Court having held that these matters are admissible and reasonable in evidence. Mr. Clark has suggested that to permit the testimony to run a little bit more smoothly, that instead of inter-[fol. 1710] posing the objections in each instance where these matters are referred to, that the objection interposed just before the argument on the competency of the declarations made and for the same reason as heretofore stated, that record will show that unless it appears otherwise, that to all matters or declarations of the defendant subsequent to the time of his arrest, that this objection is made and that the defendant, in the Court's opinion has had the full benefit of that information.

Mr. Clark: Thank you, your Honor. I think we have saved at least a day's time in putting in these matters this way.

Direct examination.

By Mr. Williams:

Q. Mr. Lynch, will you, by referring to your notes, and reading therefrom, state what was said to and by the defendant on the occasion on May 2nd, 1936 at 11:45 A. M. in the county jail, of Los Angeles County when he was questioned by Deputy District Attorney Williams, and in the presence of Deputy Sheriff Virgil Gray, Mr. Killion, and Mr. Charles Hope and yourself?

[fol. 1711] A. "By Mr. Williams: Q.— James, do you know this man Chuck Hope? A— Yes, I know him. Q— Now, Chuck Hope told us this morning that on the 4th day of August, the day before your wife was killed, he came out to your house; that on the day before that, at your request, he had purchased and delivered to you three rattlesnakes; that he came to your house between 11 and 12 o'clock on the Sunday, the 4th of August; at that time, he went into the house, and you had your wife in the breakfast nook strapped or tied on the table with her mouth bound with adhesive tape and adhesive tape over her eyes; that he brought the rattlesnakes in and you put her left foot into the box of snakes with your hand and one of the rattlesnakes bit her.

"After that, he went away with your automobile and took the snakes and returned them to Snake Joe in Pasadena where he had gotten them. He came back about 1 o'clock Monday morning, that same night but after 12 o'clock, and at that time, he met you out in the garage, and you told him out there that your wife was not yet dead.

"He said that you had some drinks; that you left him; at 4 o'clock you came out and said—no, that is not correct— at 1 o'clock you told him you were going to drown her in the bath tub. At 4 o'clock you came out and told him she was dead. Then you went back into the house and about 6 o'clock or 6:30 you came into the garage again and told him she was dead, that you had the mess all cleaned up [fol. 1712] and for him to come in and help you carry her out.

"He went into the house. She was lying in the hallway between the bathroom and kitchen door. You picked up the head portion of her body. He picked up the feet or legs. You carried her out to the fish pond, right alongside of the fish pond and he laid her down alongside the fish pond. She was dead at that time.

"He left and went and got into the automobile. You stayed and put her body into the fish pond and then came out and got in the automobile. In the meantime, you had taken a lot of wet clothing and towels and put them in a bucket in the back of the automobile.

"You went down to his apartment where he was living near Virgil Street, and he took this clothing and told you he would get rid of it. That included several blankets, some towels, a sweater and other clothing, and he did get rid of it.

"He makes that statement. Have you got anything to add to it? By Mr. James: A— Nothing. Q— Nothing— that is all." End of statement, 11:50 A. M.

Q. Is that the entire statement, and every word that was said in your presence at that time?

A. Yes, sir.

Mr. Williams: You may cross examine.

[fol. 1713] Cross examination.

By Mr. Clark:

Q. Mr. Lynch, I may have asked you this already, but did you take down in shorthand everything that was said while you were in the room?

A. Yes, sir.

* * * * * * *

Willard L. Killion, recalled as a witness in behalf of the People, having been previously sworn, testified as follows:

Direct examination.

By Mr. Williams:

Q. Mr. Killion, you have heretofore testified that about midnight on May 2nd, 1936, you and Deputy Sheriff Gray

and Investigator Davis, and a young lady you named, and the defendant, James, had dinner at a cafe at 5th and Figureoa. During that time was any statement made by the defendant to you concerning the matter of the death of his wife?

A. Yes, sir.

Q. Did you, at the time the statement was being made, make notes or memorandum of what was being said?

A. Yes, sir.

Q. And those were made by you at the very time?

A. Yes, sir.

[fol. 1714] Q. And if you need those in order to refresh your recollection in regard to any of the details, I am sure it will be proper for you to use those notes, but——

Mr. Clark: Before he does use them, I would like to examine them, and perhaps examine him on voir dire concerning them.

The Court: You may do so.

Mr. Clark: May I see the notes now, Mr. Killion? It will save time, perhaps.

A. These notes are some in shorthand, and some in longhand, and some in scribbling.

By Mr. Clark:

Q. Do you write shorthand?

A. I did some years ago. Starting on this page, and ending on this, is the scribbling that I made at that time.

Q. Now, Mr. Killion, the pages you indicated, and that I hold in my hand, have they anything other than the notes to which you refer?

A. No.

Q. So that if these pages were cut out of the book, and filed here, we would have all of the pages, and you would still have the other matter available to you.

A. That is correct.

Q. If this should be filed here, would you prefer to have that done, rather than the whole book impounded?

A. Yes, as the other matters in the book have no bearing upon this.

[fol. 1715] Q. Now, the shorthand characters here were all written by yourself at that time?

A. Everything on those pages was written by me.

Q. The other matter is all in your handwriting?

A. It is.

Q. And all of this writing was done while you were in that restaurant?

A. Yes, sir.

Q. And the matter consists of 31 pages, as I count them?

A. Yes, sir.

Q. Now, was this all written at the same time?

A. All at the time we were in the restaurant.

Q. Was it all written with the same pencil?

A. No, I don't believe so. I used other pencils because of some of them becoming blunt; that is as I recall it.

Mr. Clark: I think that is all, except, if your Honor please, I would like to have the witness, when he finishes his testimony, take the pages out and have them filed for identification.

By Mr. Williams:

Q. Now, Mr. Killion, just give us as completely as you can everything that was said by the defendant, the questions that were asked him, and the entire conversation at the restaurant.

A. Starting at the restaurant, or before we went to the restaurant?

Q. Whenever the circumstances start, just state what [fol. 1716] they were?

A. The circumstances started in the District Attorney's office, the circumstances surrounding this statement.

Q. All right, just state what was said and done.

A. A short time before midnight, in the office next to the District Attorney's office, James said to me, in the presence of Mr. Gray, "Why don't we go out and get something to eat, and I will tell you the story." I said, "All right." Thereafter the person mentioned went in my automobile to the restaurant at 5th and Figueroa, and upon being seated I said to Mr. James, "Well, do you want to tell us the story now?", and he said, "No, let's have something to eat, first." So we ordered a dinner. As I remember, we had a steak dinner. After the dinner was finished we bought cigars. Mr. James had a cigar, and he said, "Now, you want to have this story?", and I said, "Yes." So, he said, "All right; there is no hurry, is there?" I asked him if he wanted to go back to the office to tell the story, and he said, "No, this is all

right, isn't it?" I said, "Sure, it is all right." So he said that about July 4th of this year—of 1935, I mean, was when Mary, his wife, had gone to Long Beach. He said that Charles Hope came to his, James' house, in La Canada, and at that time his, James', sister, Mrs. Murphy, was living there. James said that when Hope came he remembered the occasion, because of his having some game chickens, and Mrs. Murphy, his sister, was helping him [fol. 1717] with them in the garage. James said that Hope had no money, and no place to stay, and wanted to stay there. He said that Hope told him he had left his car down on Verdugo Road, and Mr. James said he noticed that Hope was drinking, in fact, he thought he was drunk, and that he didn't want Hope to stay there. He said that when Hope asked him if he could stay there all night, that since he didn't want him to stay, being drunk, he gave him a dollar to pay for a room in which Hope could sleep. Mr. James said that Hope came the next night about suppertime, and at that time he gave Mr. Hope a key to the place, and showed him the sun parlor as being the place where he could sleep, and that Hope stayed there on a Tuesday [fol. 1718] night. He placed the Tuesday night as being that of the Tuesday night after Mary had gone to the Dental Convention in Long Beach. He didn't know the exact date.

James said the next Thursday after that Tuesday, he was alone and about 2 o'clock—I mean he was alone at the Italian Village at Los Angeles, and he got drunk there and he met Madge Reed———

Mr. Clark: Just one moment, if your Honor please, I object to any narration of anything that the defendant said in regard to the Madge Reed or what occurred between the defendant and Madge Reed on the ground that it is irrelevant.

The Court: Objection overruled.

A. He said that he met Madge Reed and a blonde beauty operator at that place, and that after spending some time with them, they drove his car home, and that some place along the way, he doesn't know where, the blonde went away, that is she was not in the car anymore, and that he lost his memory then and didn't remember anything more until about midnight when his, James' wife, awakened

him by bathing his face with a wet cloth. He said his wife laughed and said, "Who was the woman that was here?" And he said he didn't remember. He said that his wife went back to Long Beach on Friday morning and that on Saturday, after that Friday, Madge Reed, came by his barber shop on 8th Street and she said to him, "You owe me three dollars. I spent that for cab fare and lunch", and that he gave her five dollars at that time and that he [fol. 1719] never saw her again until after Mary's death.

He said that Mary came from Long Beach on a Saturday and when she came she was sick, and on the Sunday following that Saturday his sister, Mrs. Murphy, was going back east and that he took her to the train on Sunday night. On Monday, following the day that Mrs. Murphy went east, that Mary was still sick and he took her to a Doctor George for examination. He said that they went to Santa Ana to get a marriage license and did get a license and were married on July 19th, and that after the time of their marriage on July 19th, that Mary was sick all the rest of the time of her life.

He said that he and Hope had talked about the insurance on Mary's life. He said that Hope knew she had the insurance because he, James had told him that she had $5,000.00 insurance. He said that he and Hope drank together on many occasions. He said one thing Hope said, "Why don't you bump her off and get some money?" He said that Hope said, "Let me do it." He said that Hope would get drunk with him on many occasions, and each time they got drunk that they would talk about the insurance and about doing away with Mary. He said on one occasion, he and Hope discussed some way to get rid of her and Hope said, "Drive her out in a car and I will hold her up and shoot her", and Hope said, "There are many other ways. He said that about that time, Hope brought some stuff in some sacks. He thought it was rattlesnake poisoning in a powder form and that Hope [fol. 1720] thought it was deadly. At that time they got drunk again and nothing definite was decided upon. That Hope continued to see him, and that Hope told him and Mary that he, Hope, was a medical student, and that Mary wished to have an operation performed, that she didn't want to become a mother, and they talked it over in her presence and she had been learning that, she told him, it

seems, that she wanted Hope to do something to her to cause her to have a miscarriage.

About that time, James says he didn't remember the date, but he said that Hope was away for about a week and he came back and said, "Well, Mary was dying anyway. She is sick. Why don't you kill her and let us get the insurance?" And then he said that Hope sprang the rattlesnakes on him and told him about getting snakes. He said, "I will go out and get a rattlesnake that will kill her quick." He said on that occasion that they would get drunk again Hope said, "I will go and get a snake."

He said it was arranged and he gave him $20.00 and that Hope came back with two boxes, two snakes in one box and one in another. They put the snakes in the chicken house and locked the chicken house. He said, "It must have been dog days, because those snakes wouldn't bite anything."

Then Hope got two snakes, he thought, in Venice, and at the time he got them he got a white rabbit and put the rabbit in the box with the snakes, and left that night—the night that they put the rabbit in the box with the [fol. 1721] snakes, Hope left the girl back to his hotel. He said he didn't know whether it was his girl or wife. In the morning, when he, James, looked at the rabbit and the snakes the rabbit was dead.

He realized he was doing the wrong thing and he said to Hope, "We are both nuts". Hope said he had to have some money. He said to James, "You have a job and I have nothing and we have gone so far now that we cannot quit. We have already committed a crime now with the thing we have done." He said, "You get a spider and try that", and he brought some spiders and when Hope brought them, that James threw them out and that there was nothing done with them.

A day or so after the spiders had been brought, Hope said he had found a place where he could get a real snake and Hope said to James, "Let me take your car in the morning and I can get them."

He said Hope took the car and went to some place in Pasadena and brought them to the barber shop and they went home together on Saturday night.

They took the snakes from James car and put them in Hope s car and drove to El Canada and then they got

drunk. And that was on Saturday night. He said that Hope and Mary talked about an operation, Saturday night, after they became drunk, Hope left. He, James, and Mary [fol. 1722] continued to drink on Saturday night, and Hope came on Saturday morning, and he was half tight, James said, and they got some more to drink, and got her tight. Hope said he was going to do the work, and James said that about 1:00 o'clock in the afternoon on Sunday, that he, James, took his automobile and drove away, after Hope had told him he was going to do the work. James said that he didn't know anything about any tape being used on Mary, but that he did know that Hope was going to kill Mary with the snakes within an hour. He said that he left at about 1:00 o'clock, and came back about 3:00. He said that Mary was apparently pretty sick and she didn't know what had happened, but she was in bed very drunk. He said that when he spoke to her, she said that she was very sick, but she guessed she would be all right tomorrow, and she kept calling for him, for James.

He said that he had Mary write the letter that had been—that was found on the table, the letter in the envelope addressed to Mary's sister in Nevada. He said that Hope then took the automobile and left, and James continued to drink all Sunday, and that Hope came back about 6:00 o'clock Monday morning and asked if Mary was dead, and James said "No, she is all right", and Hope asked, "Did the snake bite her?", and James said, he didn't know. James said, "She is all right." And Hope looked [fol. 1723] at her leg, which was black, and he told James that he turned the snakes out, and he said, "What will we do?" James said, "I am going to get drunk."

Hope told James to go ahead, and he would finish the job, and he said, "How are you going to do it?" "I will set the house on fire, and in that way we can get everything." He said, "We cannot quite now. They will know about the snakes." He said that Hope told him to go on to work, and that he was going to finish the work there. He said he got in his car and started to work, and he felt like taking a drive, and after he drove out on Wilshire Boulevard he then drove to his shop. He said that Hope came into his shop between 12:00 and 1:00 o'clock on Monday, and they went to Melody Lane for lunch. There Hope said to him, "Well, I got rid of her." James said, "You burned the house?", and Hope said, "No, I drowned her in the bath

tub." And James said, "Well, you are the craziest son-of-a-bitch I ever saw." He said they had a big argument there, and he told Hope, "Don't you know they will throw me in jail tonight?" He said, "I had a wife drown in Colorado in the bath tub, and I know I will be in jail.", and Hope said that she was too sick and drunk to know anything about it when he put her in the bath tub; he said that he put a belt around her arms, and tied her, and James then talked to Hope some more about the Colorado wife. James then said to Hope, "Well, I went in with you, and I will take the rap. [fol. 1724] I will have no defense." He said that at that time he gave Hope $30.00. He had only $40.00 with him, and he told Hope at that time, "I will take all the blame." Hope told James that he had cleaned the house up good, and had taken the blankets, and sweater, and so forth, to his house, and had burned them up, and he then told James that he had thrown the body of Mary into the fishpond. Hope said that he had taken all of the evidence to his, Hope's house, and destroyed it. James said he then stated to Hope, "You damned fool, did you burn up that stuff?", and Hope said, "Yes." James stated then that the woman—he said he didn't know whether it was his wife, or his girl, but he said, "She will spill everything.", and Hope said not to worry about her, that he had enough on her to hang her, told James that he and the woman went to a party on the Sunday night preceding the date on which they were talking, and that she knew all about it, anyway, but she would be afraid to talk. James said he had a notion to kill Hope, but was afraid that if he did that the woman would talk anyway, and he didn't want to have to kill them both. Hope told James that he took the snakes away, and while the woman was in the house at the party which they had attended, he turned the snakes out. He again assured James that he had enough on that woman to keep her from talking. Hope then told James while they were talking in the restaurant that some people had come while he, Hope, was in the house on Verdugo Road in La Canada trying to have [fol. 1725] the snakes bite Mary, but that he had had the blinds down, and the doors locked, and he was in there with Mary, and he didn't answer the summons that had been given at the door. James said, "That probably is when Ethel was there and left the note." Hope had told James that if he could kill Mary as he had, that they could get

double indemnity on the insurance, and they would split it 50-50. James said at that time he was afraid about what Hope had done, and thought he had better take some one with him when he went home, so he took Pemberton and the girl with whom he was keeping company, Viola Lueck, with him that night, as he didn't want to find her alone. He said, "The rest of it that Hope has told you is true." He said then he didn't see Hope any more from that day at lunch, which was Monday, August 5th, for about a month. He said Hope then began to come into the shop and mouch him for money. He said he had given him $100.00 on Sunday, August 4th; he had given him $30.00 when they had lunch; in the shop he had given him $25.00 on one occasion, some other amount on others, and one time when he had returned from San Francisco he had given him $100.00 He said that on an occasion or two he had a notion to kill Hope, but he knew that Mrs. Hope knew all about it, anyway, so he didn't want to do that. He said that Hope began to act very screwy in the shop, and he came in there and was talking about being picked up, so Hope told James that he was going to San Francisco again, and Hope was given $25.00 by [fol. 1726] James to go to San Francisco. He said that when the insurance cases were over, when he, James, got the $1700.00 insurance, Hope came to Los Angeles, and James gave him another $100.00 and told him he would share the $5,000.00 if he got it; that about two weeks before James was arrested Hope came one night, and was drunk, and was beefing, James said, and said that James told him, "Well, we played and lost." James said, "I am not going to be chiseled any more for money." Hope said, "If you don't give me some I will squeal." James said, "All right, squeal." He said, "Go ahead and squeal." James said, "Now, that is the story, and I never would have told it if Hope hadn't squealed. There isn't enough men in the District Attorney's office to make me talk." That is the end of the conversation that we had with James in the restaurant.

Q. Thereafter did you return to the District Attorney's office.

A. Yes, sir.

Q. Did you then have a conversation with Mr. Fitts and Mr. Stewart?

A. Yes, sir.

Q. Thereafter was the defendant questioned by Mr. Fitts in the presence of Mr. Stewart and Deputy Sheriff Gray and others?

A. Yes, sir.

[fol. 1727] Q. And did Dorothy Adams there take stenographic notes of what was said?

A. She did.

* * * * * * *

Dorothy Adams, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Dorothy Adams.

Direct examination.

By Mr. Williams:

Q. Miss Adams, what is your occupation?

A. Statement reporter in the District Attorney's office.

Q. You will have to speak a little louder than you are talking now. You have been a statement reporter for a number of years, have you not?

[fol. 1728] A. Yes.

Q. In the early morning of May 3rd, 1936, did you take in shorthand a number of questions and answers in the office of Mr. Fitts?

A. I did.

Q. Who were present at that time?

A. Mr. Fitts, Mr. Stewart, Chief Plummer, Charlie Griffen, Jack Southard, Everett Davis, Mr. Killion, Mr. Gray, and myself.

Q. Did you take in shorthand every question that was asked, and every answer that was given?

A. Yes.

Q. Thereafter did you make a transcript in typewriting of your shorthand notes?

A. Yes, I did.

Q. Did the notes correctly reflect what you had heard?

A. They did.

Q. And did the transcript correctly reflect your notes?

A. Yes.

Q. Would it be more convenient for you to use the transcript to reflect your recollection in testifying to what was said?

A. Yes.

Q. Using the transcript, then, will you just state what was said, the questions and the answers, at that time?

A. "Statement of Robert James, made in the office of [fol. 1729] the District Attorney of Los Angeles County, Room 649 Hall of Justice, Los Angeles, California, at 1:55 A. M., May 3rd, 1936."

Q. Miss Adams, pardon me. I know it is difficult, but you will have to speak a little more loudly.

A. I will try. (Reading): "Mr. Fitts: Mr. James, the boys have told me that you told the story. Mr. James: They have got it. Q.—Will you just begin in your own way and tell me the story that you told them down there? A.—It's a long one; it will take three or four days. Q.—All right; go ahead. A.—I started it the week my wife went to Long Beach, which was around July 3rd or 4th. This fellow Hope came to my house and said he was out of work, broke, and his gal threw him out and he didn't have any place to sleep. He was drunk. He drove up to my garage where my sister and I were doctoring some chickens that had the roup. I wouldn't let him stay that night and gave him a dollar and told him to go somewhere where he could get a bed. I said, 'You get sober and come up tomorrow night. You are a good friend of mine and if you are in bad shape I'll let you stay here until you get on your feet.' He said, 'I'll be up here sober tomorrow', and so he did. He came up sober and stayed Tuesday night and Wednesday night. My sister was there. She met him and fixed our meals. Thursday night——

Q. When was this?

A. I'm talking about the first of July on.

[fol. 1730] Q. This conversation that you are giving us, when did that take place?

A. If you could tell me the date that she went to Long Beach on this convention which was around 1st to the 4th of July, I could tell you the exact date.

Q. It was on Thursday following the 4th of July, 1935.

A. As I said, he came up Monday night drunk after I had taken her to Long Beach Sunday.

Mr. Gray: July 4th, 1935, came on Thursday.

A. That is the wrong date, then. I took her to Long Beach on Sunday. It was earlier than the 7th.

Q. Could it have been the last day of June?

A. It must have been because she came back and was home a week before we were married and we were married the 19th.

Mr. Fitts: What convention was that?

A. It was a dental convention, and she had had a lot of dental work done, a special bridge, and they gave it to her free if she would model for them. She took a week off to go model. As I said, when I took her down Sunday, he came up Monday night. My sister was visiting me from Birmingham, and I gave him a dollar and said to come back the next night sober. He came back and stayed Tuesday and Wednesday night, and I gave him a key. He slept on a sleeping porch in front of the house. Thursday my sister said she was going to spend the night with Ethel—that's my niece. He wasn't coming home. He never came home all night; he may have gone and stayed the night with [fol. 1731] his girl. I didn't ask him. Thursday afternoon I went to the Italian Village and I got drunk. I didn't go back to my business. I met a couple of girls there and I danced with them all evening. I think it was about five o'clock when we left and I couldn't drive my car, and this girl said she was a good driver. She had not been drinking much, and I told her I would give her $10 if she would drive me home. After we got in my car I got so drunk I passed out. She let this blond-headed girl out somewhere and she took me home and put me to bed.

Mr. Gray: Who was that girl?

A. That is that Reed woman, Madge Reed. She got hungry and went out and got herself something to eat. Naturally I went to sleep, and while I was asleep my wife came home. Some dentist who lived close to us decided to come see his folks and brought my wife home with him. She came in and saw this woman coming out of the bathroom. The woman said, 'Are you his sister?' That is what my wife told me. I was asleep and didn't know. She said, 'No, I'm not his sister; I'm his wife. Who are you?' She said, 'I'm just a friend of his. I brought him home, and he told me he lived here with his sister.' So she told her she was my wife and she took her to the bus in the car

to Montrose and put her on the bus. After putting her on the bus she came back home and I don't know, it must have been around midnight when she woke me up bathing my face with cold water. I said I was surprised to see [fol. 1732] her there, and she said yes, and she was surprised to see me here. I said, 'I wouldn't have been if I had not gotten drunk.' I said, 'I meant to go to a picture show and stay out late.' I said, 'You should have told me you were coming home,' and she said she didn't know she was coming home. She kept laughing and grinning and finally said, 'Who was the woman you had here?' I couldn't remember her to save my life. I think she knew the stupid condition I was in and was honest and hadn't any idea I had a woman there. She said, 'You had a very pretty brunette here.', and she said, 'I took her down to the bus and sent her home.' So that was about all she said about it. She didn't seem to be mad. She wasn't a jealous woman.

Mr. Fitts: You are speaking now of Mary, your wife?

A. Yes. I believe it was Saturday this girl came by the shop——

Q. Meaning the Reed woman, now?

A. Yes. She said, 'You owe me $3.00 for a taxicab. You nearly got me killed the other night. You told me your sister lived there. What did you tell me that lie for?' I said, 'I was drunk. I might have told you anything when I was drunk.' I said, 'You didn't go home in a taxicab; my wife told me she put you on a bus.' She said, 'I didn't go on a bus; I got a cab, but I spent a dollar for dinner,' and I gave for a $5.00 bill and she told me how sweet my wife was to her. I said, 'I never did anything like that before [fol. 1733] and I suppose she knew I was drunk.' Then she left me. She got the money at the barber shop; I gave her a $5.00 bill and she left.

Q. When did you first discuss with Hope the question of killing your wife, Mary?

A. When she was in Long Beach while he was there.

Q. While Hope was at your place and your wife Mary was at Long Beach?

A. Yes. Somehow or other he knew she had this insurance. Whether I told him or she told him I don't know. Anyway, he knew she had this insurance. After she came

back he knew she was very sick. He talked to me and said, "She is going to die anyway; why don't you kill her?"

Q. What did you say to that?

A. I told him I couldn't do it. He said 'Let me do it.' I said, 'How would you do it?' 'Well,' he said, 'I'll take her up here and I'll shoot her in a holdup.' I said, 'Yes, there have been a lot of people hung for that.' So he had some kind of a white powder in a box. I don't know what it was, but he said, 'I've got something right here. I have been working with a bunch of racketeers. You can just break the skin on your hand and rub a little bit on it and it will kill you in five minutes.' I thought it was ridiculous. In fact, he wanted me to get one of my chickens and try it on it. He was drinking and I didn't pay any attention. That is where he sprung the story on me about the rattle- [fol. 1734] snakes. I never saw a rattlesnake bite anybody. He said, 'These California rattlesnakes will kill you in fifteen minutes. I'll get a good couple of snakes and do the job myself.' It was agreed upon that I would give him half the money.

Q. Half the money with which to get the rattlesnakes?

A. No, that I collected from the insurance. I gave him $20 and he went out, and the next day——

Mr. Gray: Just to interrupt you there, I think you will recall in your story before this point about the rattlesnakes, after he had talked to you about the powder, didn't you say that he went away for a little while and then he came back and told Mary that he had a medical student and could perform an abortion on her that she wanted performed? Isn't that correct?

A Yes. When Mary came back from Long Beach she was pregnant and I don't recall just how he met her; it seems he came to the house and I introduced her. She asked me who he was and he told her he was a medical student and she asked me if he was, and I told her yes. After she had been sick there for quite a while she said she decided that she couldn't go through with having her baby. She said, 'I can't make it; my health won't permit it.' She wanted me to take her to a doctor. I was afraid to because she was in very, very bad shape. She said, 'Hope tells me he is a doctor. Why don't you let him take care of it?' I said, 'When I see him again I'll tell him

about it.' That was when he disappeared and I didn't see him for a couple of weeks.

[fol. 1735] Q. That was in June or July?

A. July, after she came back from Long Beach. So Hope got to going out to the house and he talked with her, visited her, and told her he was a medical student. So it was finally agreed that he would take care of her. That is where his story comes in, on Sunday morning that he was supposed to have performed the abortion on her was the Sunday morning that if he put her foot in the box with the rattlesnakes, I didn't see it—was the morning he did it.

Mr. Fitts: Up to that time you two had agreed to have the snake bite her. Is that right?

A. Yes. He had gone out and got some; in fact he brought three up there.

Q. Those are the ones he got in Long Beach?

A. I don't know, he never would tell. He had certain kinds of boxes made and he brought them up in a box. It was dog days and they were blind. They wouldn't bite any one. He took them away and he brought two more back and they would bite but they didn't have anything in them.

Q. How do you know that?

A. Because he put rats, chickens, and a rabbit in the box with them. In fact he put a rabbit in the box with one of them and the next morning the rattlesnake was dead and the rabbit was walking around.

Q. That was the second batch. You bought three altogether?

A. Yes. I Laughed at him about his rattlesnakes and [fol.1736] that was the time that I told him he would lay off of it. So he got a spell on him one day that he had found some hot ones. He said, 'I have found a fellow in Pasadena who has some that will really do the work.'

Mr. Grey: When did you bring the spiders?

A. That was somewhere in that time.

Q. Was that before you brought the last snakes?

A. Yes.

By Mr. Fitts:

Q. What kind of spiders?

A. He took my car. He got it one morning from the place where I was getting it greased. I think he kept it about

three days. He came back drunk. He told me a cock and bull story. He said he had gone to Phoenix to get these black widow spiders. He had a glass jar full and the top had holes in it.

Q. How long was that before you bought the third bunch of rattlesnakes?

A. That was just before he brought them. So he said, 'All you have to do is throw them in bed with her and they will bite her.' I laughed and threw his damned spiders out. He came over there to the shop and I said, 'Hope, you are nuts and so am I. Forget about it.' So he went away and he said he would. The next time I saw him he was drunk. He is nuts when he is drunk. He said, 'Come out here; I have a tip where I can get some hot snakes,' and I laughed at him. He said, 'All right, it will cost you $6.00. You give [fol. 1737] me the $6.00 and I'll go over and get them.'

Mr. Killion: When you had this conversation what was it you said to each other about having already committed the crime about doing what you had done with the snakes?

A. I didn't want him to get the other snakes. I said, 'We will fool around and get in trouble.' He said, 'We already are. We have been hauling rattlesnakes around in the car, which is a deadly weapon and a felony.' I didn't know anything about that. I said, 'No one knows it but you and I.' He said, 'I know it, and you aren't going to walk out on me now. You have a barber shop and you are making a living and I want to make some money.' I gave him the money and he goes over and gets the two hot snakes.

Q. What day was that?

A. Saturday night before she died Monday.

Q. How much did you give him?

A. $6.00.

Q. Was his wife along at the time?

A. Yes.

Q. Does she know anything about that, what the snakes were to be used for?

A. To a certain extent. So he came back Saturday night and met me at the shop and he took me home and we got drunk together.

Q. Tell about the transfer of the snakes in the service station?

[fol. 1738] A. He brought the snakes back from Pasadena in my car. He put them in his coupe and followed me to

my house. I had a pint of whiskey. We drank and my wife drank with us. She dearly loved booze. No matter how sick she was she loved a drink. He had the two rattlers with him. He put them in the garage.

Q. Where?

A. The garage.

Q. What were they in?

A. In a wooden box with a glass top on it. I don't know where he got the boxes. He said he had them made somewhere. He had one in each box. So he put them in the garage and locked the garage up, and some time during the night he got in his coupe and left. He said, 'I'll be back up here in the morning.'

Q. And before he left that night, while you were drinking, he talked over with Mary again the performing of the abortion that night?

A. Yes, he promised that he would come back the next day and perform the abortion. So she was very happy to do it. So the next morning, I don't think I ever quit drinking. I think I drank along all night, and I was pretty tight when he got there that morning.

Mr. Fitts: What time did he arrive?

A. Around 11 o'clock. I gave him practically all the money I had, and $100, and I left, and as to what he told [fol. 1739] me about her being taped and tied up, I don't know. He took care of that himself. I left there about one o'clock and I think I returned about four. He said she would die in an hour, or fifteen minutes. I returned about four o'clock Sunday afternoon and I went in to see her and he had her full of liquor. In fact, he was very drunk himself. There were two or three bottles setting in the room where they had been drinking.

Mr. Killion: What did he tell you when you left at one o'clock? Did he tell you he was going to do the work?

A. Yes. I told him I couldn't have anything to do with it because she had been too good to me, and I just couldn't have anything to do with that part of it. I was very drunk and I got in my car and left, and I just drove around. I went back about four o'clock and asked him how she was. He was so drunk he hardly knew what he was doing himself. I stayed there a while and she didn't complain about anything bothering her at all.

Mr. Fitts: What was she doing when you got there?

A. In bed covered up. So he took the car and left and he stayed until about six o'clock the next morning.

Q. Where were the rattlesnakes at that time?

A. He took them with him.

Q. Did you see him bring the rattlesnakes in the house?

A. I didn't see them in the house. I saw them in the garage.

[fol. 1740] Q. Did he tell you he had her bitten by the rattlesnakes?

A. When I came back, he did.

Q. What did he say?

A. He said he put her foot in the box with one and it bit her three times. He said, 'I don't know what's the matter with her. Unless the snakes has bitten so many times he's not poison. It doesn't have any *affect* on her at all.' I talked with her and she was drunk.

Q. What did he say he had done?

A. He said he had inoculated her in the leg and performed the abortion and her leg hurt. She kept complaining and that was the first time I saw it after he left. His wife was waiting for him on the corner all the time in her car. He stayed all night. He left me with her. Naturally I was all upset and she and I just sat there and drank all night. I don't think she ever felt her snake bite. So he came back about six o'clock the next morning and her foot and ankle were swollen. I said, 'She's all right, nothing the matter with her,' and we talked her over and I said, 'What are you going to do about that? We had better call it off.' He said, 'We have gone too far. They will know it's a snake *nite* and she is going to talk, and we have gone too far to stop.' I said, 'What are we going to do with her?' He said, 'You leave that to me. You go on and go to work and I'll take care of her.' I said, 'What are you going to do with her?' And he said, 'I'll tell you what I'm going [fol. 1741] to do. She smokes a lot of cigarettes, and lots of people die by smoking in bed. I'll burn the house up.' I kept taking a few drinks and I got in the car and left about six o'clock.

Q. With the understanding that he was going to take care of her by burning the house?

A. That's what he said he was going to do. I went to work. Instead of driving on Wilshire Boulevard I drove

all the way to Sawtelle. I was drunk and was tryin to get sober. Finally I arrived at work a quarter of nine. I had some breakfast, and about one o'clock or a little after he came down to the shop and said, 'Everything's all right.'

Mr. Killian: He said he got rid of her, did he not?

A. We went to Melody Lane and had dinner and talked about it on the way back.

Mr. Fitts: Back where?

A. To the shop.

Q. When you say 'dinner' you mean lunch?

A. Yes, lunch. On the way back to the shop I said, 'Did you burn the house up?' and he said no. I said, 'What did you do?' He said, 'I threw her in the bath tub and drowned her.' I said, 'You God damned fool, that's the worst thing you could do.' He said, 'Why?' And I said, 'That's the worst thing you could have done. I had a wife drown in a bath tub in Colorado Springs a little while ago.' He didn't know that. If he had he wouldn't have done it. 'Well,' I [fol. 1742] said, 'you really played hell but it's too late now.'

Q. Because she was dead?

A. Yes.

Q. That is what he told you?

A. Yes. I said, 'What did you do with her, leave her in the bath tub?' And he said, 'No, I threw her in the fishpond.' I said, 'That won't stick. They will throw me in the jug when they find her. I'll be a good sport. You made a God damned fool of yourself and me both, but I'll take the rap. I won't talk. There ain't enough men in the District Attorney's office to make me talk,' and there wasn't if he had not told it. You never would have got me to talk. So of course I arranged for this couple to go home with me.

Q. Did they know anything about it?

A. No.

Q. They were perfectly innocent?

A. Absolutely. They don't know a thing about it.

Mr. Killian: At this time at the luncheon where you went to lunch together, did you give him some money?

A. I gave him all I had. I think I had $40 and I gave him $30 of it. I said, 'Here's all the money I have. You get the hell out of here and stay away. I'll take the blame

for it and I won't talk. I was a God damned fool to get drunk and enter into a thing like this with you. If I had been in my right mind I wouldn't have done it. You have made a damned fool of us and I'll take the rap.' I said, 'I [fol. 1743] don't care about living anyway. Somebody is going to jail and it doesn't need to be both of us.'

Mr. Davis: James, in your story this evening you told us that certain evidence had been destroyed because of blood on blankets. Tell Mr. Fitts about that, will you?

A. Oh, yes. While we were at lunch he said, 'I cleaned up the house. I got water all over the floor of the bathroom. I had your sweater on. I mopped up with a few things, towels and things, and her foot had bled all over that bed.'

Mr. Fitts: What?

A. He said her foot had bled all over the bed.

Q. Where the snake had bitten her?

A. Yes. He said, 'I took your sweater and all the towels and the blankets and I straightened your house up good.' I said, 'What did you do with them?' He said, 'I took them over to the house and burned them.' I said, 'Are you sure you burned them?' I said, 'Are you sure?' And he said yes. I said, 'Hope, if you took that stuff over to your house where that woman of yours can get hold of them she will break your neck.' He said, 'I didn't; I burned them.' I said, 'Did you burn the blankets too?' He said, 'Yes. She wouldn't talk anyway. I have got stuff on her that she couldn't talk.' I said, 'What have you got on her?' and he said 'It's her business,' and I couldn't get it out of him. I don't know what he has on his woman.

Mr. Gray: Did he tell you that he had told her all about [fol. 1744] what happened?

A. He said he told her when he left Sunday night what had happened. He said they went to a party and while they was in the party he said the snakes were in the car. I knew what those snakes did, they rattled every few minutes. If you put one in the box it would get mad and rattle. I said, 'You don't mean to tell me you took those snakes along in the car with that woman and she didn't know what they were?' and he said 'Yes.' I kept arguing with him and he finally admitted to me that she knew about it.

Mr. Fitts: James, while you are making this statement let's clean it all up, if you will. Did you kill the girl back east in Colorado?

A. No, that was all on the level, absolutely.

Q. And your nephew in San Francisco?

A. I was here and he was up there.

Q. Did you have anything to do with that?

A. How could I?

Q. I am asking you?

A. You know how he got killed?

Q. Automobile accident.

A. Could I have had anything to do with that. My sister is crazy, and she's always had it in her mind. She is really insane. She has had it in her mind that I killed my wife in Colorado and her son and Mary.

[fol. 1745] Q. In other words, she has just been wrong on two of them, is that right?

A. Yes. The same thing is affecting her that is affecting me.

Q. You mean it is hereditary?

A. I think it is. I am anxious to find out.

Q. Let me ask you. You were at the point in your story where you were having lunch the day, Monday, of the killing of Mary, at which time you gave him $30, and told him to beat it and not see you any more. He has been coming back to the shop frequently since then, hasn't he?

A. Yes. It seems like when I buried Mary—I went to the beach and stayed a month and I didn't see him then.

Q. This Miss Reed, you did see her at Hermosa Beach?

A. Yes.

Q. And you did offer her a thousand dollars to say she had seen Mary alive on Monday after you left for the shop.

A. I was drunk when I was with her and I was practically a blank and I might have offered her a thousand.

Q. The story that Dr. Densley has told about seeing your wife Mary around the house after six o'clock in the morning, he is clearly mistaken, isn't he?

A. I don't see how he could. Of course I wasn't there after six and I don't think in her condition she could have got up and gone out in the yard, and I don't think Hope would have let her.

[fol. 1746] Q. When you left for your shop Monday morning, and you left Hope and Mary there, you left with the idea that she was to be murdered by Hope?

A. That's what he said he was going to do.

Q. That was your idea?

A. Yes.

Q. And when you came home and found her in the fish pond you had been told in the meantime by Hope that he had drowned her?

A. Yes.

Q. When you first discussed and arranged between yourself, that is, Hope and yourself, the murder of your wife Mary, it was for the purpose of collecting the $14,000 life insurance?

A. It wasn't $14, it was $10,000.

Q. $10,000, and you were to take half of it, $5,000, and Hope was to get half of it?

A. That's right.

Q. And it was in pursuance of that arrangement made in July sometime, that three different batches of rattlesnakes were purchased?

A. That's right.

[fol. 1747] Q. And it was further in pursuance of that agreement between you two that the third batch of what you call hot snakes were purchased by Hope and the story concocted and told to your wife that an abortion was to be performed?

A. That's right.

Q. And when the supposed abortion was being performed upon her it was not the idea of Hope or yourself at all to perform an abortion but to actually murder her for the purpose of the life insurance?

A. That is what he said he was going to do.

Q. And that was your understanding?

A. That's what he told me.

Q. And in keeping with that agreement between you two, you gave him $20.00 one time to buy snakes, and $6.00 another time, and on the day of the murder, $100.00 and that $100.00 you paid him was for the preliminary part of the murder of your wife Mary?

A. That's right.

Q. And have you ever told anybody about this? Have you ever discussed this with Lois? Did you ever admit to Lois that you had killed your wife?

A. Never.

Q. Or to anybody else?

A. Never.

Q. Is there anyone who knows anything about the facts in this matter other than you two?

[fol. 1748] A. Not a soul on earth unless he has let it out himself.

Q. Did you see the snake bite your wife?

A. No, he took care of that after I left.

Q. He told you that he had done so?

A. He told me that.

Q. And that was all right with you?

A. That was all right with me.

Q. This statement that you have made has been made freely and voluntarily?

A. Yes.

Q. No promise of immunity or hope of reward, or threats or duress held out against you?

A. I have told the true stuff.

Q. Freely, and it has been made by you?

A. Yes.

Mr. Killian: About the letter that was found on the table of the living room of your home. Will you tell Mr. Fitts about that?

A. She wrote it before I left home.

Q. She wrote it at your direction?

A. Yes.

Q. And you believe she wrote it because she was so intoxicated she wrote what you directed her to write?

A. Yes.

Mr. Fitts: That was the morning of the murder?

A. That's right.

[fol. 1749] Q. August 5th?

A. Yes.

Mr. Killian: Did Hope tell you that while he was in the house Sunday some people came?

A. Yes. When I got back to the house he was very nervous. He said, 'This is a hell of a hot place up here. There have been at least a dozen people around here.' I didn't know who had been around the house there except my niece and her husband and father-in-law and mother-in-law, and they were the ones who left the note there. It seems like one or two other people came there looking for Smith but he had the shades all down and the house locked. I was out in my car so naturally they didn't think we was home.

Q. After the conversation with Hope at lunch on Monday, you took Pemberton and Viola Lueck home with you because you knew you would find the body of Mary in the fish pond?

A. That's right.

Q. You were surprised that you had not heard during the day that somebody had found her, and you didn't want to find her alone?

A. I didn't believe he had put her in the water as he said, but that he had left her in the house.

Q. And that is why you brought them home with you?

A. Yes.

Q. And the story you have told us about Pemberton and Viola Lueck is true?

[fol. 1750] A. Yes.

Q. They knew nothing about the plans you and Hope had?

A. That's right.

Q. Concerning the money you gave Hope in addition to the amounts mentioned by Mr. Fitts, you have since given him various amounts of money when he came to your shop demanding money?

A. Yes.

Q. About how much?

A. When I had that insurance settlement I bought my place and gave him $100.00.

Q. That was when he returned from San Francisco?

A. He said he had been there but I don't think he had ever been there. On several other occasions he came to the shop and demanded money. After I lost that insurance case he came to me there and told me his wife was in the hospital dying and he had to have $75.00. I wouldn't give it to him. He begged me and begged me until I gave him $2.00. I said, 'That's the last time you are going to get any money from me.'

Q. Did you have a conversation with him regarding what you would do in case you were successful in securing insurance on the second policy?

A. I told him I would give him half of it.

Q. If you got $5.00 or $10,000.00 you would give him half of it?

A. Yes.

[fol. 1751] Mr. Fitts: Hope says, Mr. James, that in the purchase of the second batch of rattlesnakes, he got those

at Ocean Park and that you went down there with him to get that batch.

A. He is lying about that to you. He never let me know where he got any snakes. I did know he got the last ones from Joe in Pasadena.

Q. How did you know that?

A. He told me.

Q. Have you ever gone down to the Ocean Park place and studied the habits of the rattlesnakes?

A. The one time I was in there.

Q. But you didn't go with him?

A. No, I didn't go with him.

Q. At any time?

A. No.

Mr. Killion: During this last conversation with him about the money, did he threaten to take some action in case you didn't give him some money?

A. Yes. When I told him I had given him all the money I was going to give him, he said if I didn't give him $200.00 he said, 'Give me $200.00 and we'll forget it all,' and I said, 'No, this is the last time I'm ever going to give you a dime of money.'

Mr. Davis: When you reached home on the evening of the 5th with the Pembertons, and you didn't find your wife in the house, where did you expect to find her?

[fol. 1752] A. Where he said he had put her.

Q. Where did you expect to find her when you didn't find her in the house?

A. In the fish pond.

Q. And did you go to the fish pond and look for her?

A. Not me. I went out the back way.

Mr. Killion: At what time of the morning did Hope tell you that he put the body in the fish pond?

A. He didn't tell me just what time. I believe he told me he put her in there around 11 o'clock.

Q. Did he ever make any threats to you about squealing on you if you didn't give him some more money?

A. I told him 'You don't need to think you are going to bleed me for money. We're all through. We played and lost and that's all. I'm never going to give you any more money.' He said, 'All right. I'm going to do some talking.' I said, 'You are just as guilty as I am. If you want to talk go ahead.' and I never saw him any more until today.

Mr. Griffen: Going back to Sunday afternoon, on August 4th, I believe you told Mr. Fitts that you went out riding in the afternoon in the car and you got back at 4 o'clock?

A. I think so. I didn't keep any particular time because I was drinking and I think I got back around 4 o'clock.

Mr. Fitts: Will you face Hope and tell him he killed your wife?

A. Yes.

[fol. 1753] 2:50 A. M. Chuck Hope was brought into the office.

Q. Mr. Hope, Mr. James has told us the story in detail about the rattlesnakes.

Mr. Hope: Yes, sir.

Q. That back in July, while his wife was at a convention, that you and he discussed the question of killing his wife with a rattlesnake.

A. No, sir.

Q. For the purpose of getting the insurance. That he paid you $20.00 on one occasion, $6.00 on one occasion, and $100.00 on another occasion?

A. That is correct.

Q. For the purpose of buying rattlesnakes?

A. Yes.

Q. And for the purpose of killing his wife?

A. No, sir.

Q. For the purpose of killing some woman?

A. Yes, sir.

Q. You tell him what you told me, Mr. James.

Mr. James: He knows it. You don't have to tell him.

Q. You tell him just what you told me a moment ago.

Mr. James: He knows that he went out and got three rattlesnakes and they were blind and wouldn't bite and he got two more and they wouldn't bite a damned thing, and he said he knew where he could get some that would bite and he went to Snake Joe's and got them. You had just as well [fol. 1754] come on, boy, and tell them what they know.

Mr. Hope: The first two batches were bought for some friend of his who was going to kill his wife. I bought the snakes and delivered them to him. The third batch he told me he was going to kill his own wife, and he took those snakes home.

Q. You knew when you were buying them, the third batch, that it was for the purpose of killing James' wife?

A. Yes, sir.

Q. And you bought them with that knowledge?

A. Yes, sir—no, sir, he told me that after he got the snakes in the car.

Q. You went on up to his house with him?

A. Not Saturday night, no, sir.

Q. Was he at the house Saturday night?

Mr. James: You bet he was.

Mr. Hope: I certainly wasn't. I was with my wife.

Q. Mr. James further says, Mr. Hope, that you represented to Mrs. James that you were a medical student and were to perform an abortion on her.

Mr. Hope: I never talked to Mrs. James.

Q. Did you know Mrs. James?

A. Only just one time that I had breakfast with them at their home and seeing her once at the shop and once on this other Sunday.

Q. Was she at home at the time you spent out there re- [fol. 1755] pairing chicken houses?

A. One day. His sister was there, and also his niece.

Mr. James: What day was that she was there?

A. That was on Sunday.

Mr. James: The Sunday she came back from Long Beach?

A. No, sir, before she went to Long Beach.

Mr. Griffen: Hope, you tell us this, how does it happen that you were introduced to Eva Murphy as a man with medical training?

A. Absolutely I don't know. He told that.

Q. No, he didn't. His sister Eva Murphy knows you as a medical man.

A. No. I have never represented myself as that.

Q. As a man who studied medicine?

A. Never.

Mr. Fitts: Mr. James further says that Sunday when he left the house at about 2 o'clock in the afternoon, that he

left you with his wife. That when he returned about 4:00 Sunday afternoon that you told her you had had her bitten by this snake and she was in bed, and that she had bled quite freely. You told him that later, that her leg had bled freely. Is that true, James?

Mr. James: That is exactly the truth.

Q. That Mr. James remained with her that night and you returned back to the James residence the next morning, around 5:30 or 6:00 in the morning.

[fol. 1756] Mr. James: Right.

Q. You told him you were going to finish the job that morning, that she was an inveterate cigarette smoker and had been drinking and that you were going to burn her body by burning the house down. Is that true?

Mr. Hope: No, sir. I left the James residence at 2:30 Saturday afternoon and didn't return until one Monday morning.

Q. You did return Monday morning?
A. Yes, at one o'clock, not five.

Mr. Plummer: Whose car did you drive?

A. Mr. James' car.
Q. Where did you drive it?
A. I took my wife up and returned the snakes to Joe's.

Mr. Fitts: James says that when he left that morniug you were left alone with his wife.

A. I was never alone with her.
Q. That later, at one o'clock on Monday, August 5th, you met him at the shop and told him you had drowned her in the bath tub. Is that true?
A. No, sir, I was lunching with my wife on Virgil and later went to the laundry between the hours of 12:30 and 1:30.
Q. At any rate, you did accept $100.00 for the third batch of snakes?
A. Yes, sir.
Q. And that was given to you up at Mr. James' house, is that true?
[fol. 1757] A. He paid me the hundred when I got the second batch of snakes.

Q. How much did he pay you on the third batch?

A. He just gave me the money to buy them, $10.00 to buy them.

Q. Later on he paid you $100.00 did he not?

A. After he received the insurance money.

Q. And you knew it was from the insurance money?

A. Yes.

Q. And you knew he collected the insurance money upon his murdered wife?

A. Yes, sir.

Q. And you received that money because of whatever participation and help you had given him in the murder of that wife?

A. Yes, I stated that before. On the Sunday, on the 4th, Mr. James never left the house to my knowledge because I had his car and had gone with it and did not return until one o'clock in the morning. The car was seen by numerous people.

Q. Mr. James, did you take those snakes back to Joe's on Sunday?

A. (Mr. James) No, he took them back.

Q. At what time?

A. He left there with them about four o'clock.

Mr. Plummer: Was he alone or was his wife with him?

A. He told me his wife was waiting on the corner in the [fol. 1758] car.

Mr. Fitts: Did he leave you alone with your wife then:

A. Yes.

Q. What was her condition then?

A. She seemed to be—I thought she was intoxicated.

Q. You say Mr. Hope did the actual killing?

A. Absolutely.

Q. And Mr. Hope, you say that Mr. James did the actual killing?

Mr. Hope: Yes, sir.

Q. At any rate, you say that you both agreed to do the job for the purpose of collecting the insurance, the life insurance of $10,000.00?

A. No, sir, when he mentioned the insurance he said it was $5,000.00."

Mr. Williams: Is that the complete statement?

A. Yes, sir.

Q. Everything that was said by anybody in your presence?

A. Yes.

Mr. Parsons: May I see your notes, please?

Mr. Williams: Just a minute; may I look at the transcript?

By Mr. Parsons:

Q. Now, the conversation started 1:55 P. M. is that right?

A. Yes, sir.

Mr. Williams: I notice that on page 10, one place you wrote $600.00 where it should be $6.00?

[fol. 1759] A. Yes. $6.00.

Cross-examination.

By Mr. Parsons:

Q. Now, your notes extend from page 8, through to where?

A. To page 68, I believe.

Q. And at what hour was the taking of the statement concluded?

A. They brought Mr. Hope in at 2:50 and it was shortly after that.

Q. Half an hour or so?

A. Yes, half an hour or so.

Q. Now, your notes run through to what page, you say?

A. 68.

Q. And from these notes you have described the statement which you read?

A. That is right.

Q. I notice here on page 17, where you crossed out some of your notes at that time, was that a mistake?

A. No, that was not a mistake. It was in connection with "I thought it was ridiculous. In fact, he wanted me to get one of my chickens and try it on it. He was drinking, and I didn't pay any attention."

Q. And why did you cross through here?

A. I don't remember why.

By the Court:

Q. Is that included in the typed statement that you wrote?
A. Yes.

[fol. 1760] By Mr. Parsons:

Q. On page 23, in a few instances were those places where you crossed through shorthand notes, do they represent figures?
A. They represent notes.
Q. What did they say, practically?
A. "I laughed and threw h[illegible] damned spiders out."
Q. Have you written over [illegible]r original notes?
A. No, I have not, but "He came over there to the shop and I said, 'Hope, you are nuts.'"

The Court: Miss Adams, you are accustomed to run a line through on something that you change?
A. Yes.
Q. Is that your explanation?
A. No, I don't know why I crossed it out.

By Mr. Parsons:

Q. The usual custom of stenographers is to run a line through, but here appears to be a place that you had written over the top of your original notes. I am questioning you, because I naturally wanted to observe those things. Out here on the side, you have a mark there.
A. Mr. Fitts did that.
Q. On page 30 have you crossed these things out and re-written?
A. That was when Mr. Fitts said, "Cross it out" and he started the question another way.
Q. In another fashion he said, "Withdraw that"?
A. He said, "What did he say he had done?"
[fol. 1761] Q. I notice at the bottom of page 50 some crossed out notes, was that withdrawn from the statement? Was that the question or the answer?
A. "He never let me know where he got any snakes. I did know he got the last ones from Joe in Pasadena."
Q. Where did he get them?
A. In Pasadena.
[fol. 1762] Q. Was the portion on page 64 that appears to have had a pencil run through it, was that in your transcription?

A. "At any rate you say you both agreed—" That was crossed out. He said, "At any rate, did you say, Mr. James—" and he may have said, "Cross that out," and I did cross it out. It makes sense later "That you both agreed to do the job for the purpose of collecting the insurance of $10,000.00."

Q. What was the answer?

A. "No, sir, when he mentioned the insurance he said it was $5,000.00."

Q. And now who were present at the beginning of the taking of this statement?

A. Mr. Fitts, Mr. Griffen, Mr. Stewart, Mr. Plummer, Mr. Southard, Deputy Sheriffs Killion and Gray, Everett Davis in our office, Mr. James and myself.

Q. Were there any other persons added to the party during the course of the taking thereof?

A. No.

Q. And had you been in and out of the office of the District Attorney during the early part of the evening?

A. Yes, I had been since about 2 o'clock Saturday afternoon.

Q. You had been there waiting since 2 o'clock Saturday afternoon?

A. I had been doing some other work. I had been taking statements from other witnesses in the case.

[fol. 1763] Q. Were you doing that in the early part of the evening?

A. Yes, sir.

Q. Then, at about the hour of 1:50 you commenced with this statement, is that true?

A. Yes.

Mr. Parsons: That is all.

Redirect examination.

By Mr. Williams:

Q. When you said that there wasn't anybody else added to that group during the time the statement was being taken, did you overlook the fact that Mr. Hope had been brought in?

A. Yes, I did. Mr. Hope was brought in.

Mr. Williams: That is all.

Recross-examination.

By Mr. Parsons:

Q. Miss Adams, from time to time, is it not a fact that there were other persons not attached to the District Attorney's office, newspaper reporters and other persons who looked into the room?

A. I believe some newspaper reporters came to the door, but they didn't come inside the door.

Q. From time to time they opened the door and looked in, didn't they?

A. They were at my back. My back was toward the door. [fols. 1764-1766] Q. Did you observe any of those persons at all?

A. Once when Mr. Fitts told them to leave.

Q. And from time to time as Mr. Fitts and the others were talking with the defendant, were the officers referring to notes or memorandum which they held in their hand?

A. I was busy writing. I didn't pay any attention to what they were doing.

Q. I understand that, but did you observe it at any time?

A. No, I did not.

Q. Did you observe when any of the officers, any of the persons in the room connected with the case, did at any time refer to any notes or memorandum?

A. I don't recall if they did.

Q. If they did you don't recall it?

A. If they did, I didn't see it.

Q. Now, were from time to time remarks made to the defendant as to what Mr. Hope had said upon a certain subject or a certain point in the discussion?

A. What my notes say is what was said.

Q. Only what your notes state?

A. That is right.

Mr. Parsons: That is all.

Mr. Williams: That is all.

* * * * * * *

[fol. 1767] CHARLES H. HOPE, recalled as a witness in behalf of the People, having been heretofore duly sworn, testified as follows:

Cross-examination.

By Mr. Clark:

Q. Mr. Hope, referring to the occasion—it may be possible that there will be some slight repetition, simply for the purpose of preserving continuity of thought. Upon the occasion that you saw Mrs. James, as you say, tied to the table was she lying stretched out on the table or was she in a sitting position?

A. No sir, she was not in a sitting position.

Q. She was lying stretched out flat upon the table, is [fol. 1768] that it?

A. Yes, sir.

Q. Was she lying upon her back, her face or her side?

A. I would say her back.

Q. You used an expression "I would say her back." Is there a doubt in your mind as to how she was lying then?

A. No sir, there is not.

Q. And at that time, as I understand your testimony you had a box with some rattlesnakes in it, is that correct?

A. One snake.

Q. One snake. Was that box placed upon the table beside her?

A. No, sir.

Mr. Barnes: We submit, if the Court please, that that has been fully covered by cross examination from page 322 and particularly 323 to 345.

The Court: That latter question was covered on page 323. However, it may be rather difficult to conduct——

Mr. Clark: It is difficult, your Honor.

The Court: (Continuing)—the examination without in a measure repeating. Overruled.

Mr. Clark: What was the rule?

The Court: The objection is overruled.

Mr. Clark: What was the answer?

A. The box was not placed on the table at her side, no.

Q. Where was it placed?

[fol. 1769] Mr. Barnes: That has been answered before, if the Court please.

The Court: You may answer it.

A. It was placed on the breakfast nook seat.

By Mr. Clark:

Q. Where was the breakfast nook seat located, that is, how far was the breakfast seat located from the table on which she was lying?

A. I couldn't say exactly on that.

Q. Approximately.

A. It could not have been much over a foot.

Q. Was the breakfast seat as high as the table?

A. No, sir.

Q. And were her feet the portion of her body that was closest to the breakfast table?

A. I don't understand that question, Mr. Clark.

Q. Well, what I am trying to get at is this: The breakfast seat had the snakes on it. Now, I am trying to find out whether the snakes were closer to her feet than any other part of her body.

A. Yes, sir. You said that table.

Q. Pardon me. I meant seat. And around what part of her body or limbs did the rope pass with which she was tied?

A. I couldn't state as to that. I noticed it on her hands is all.

Q. You remember do you, whether or not her legs were tied, or were they so she could move them about?

[fol. 1770] A. They were so she could move them.

Q. Her feet were not tied together?

A. She was not tied up, I would say, up to her shoulders an-way.

[fol. 1771] Q. Would you say that any rope was passed over her body or shoulders, and then under the table, so as to fasten her body down to the table?

A. Well, that was what I thought. I wasn't in there long enough to go into that.

Q. You mean to say now you didn't know whether she was tied in that manner?

A. I do know that she was tied in that manner, but you asked me how it was tied around the table, and I don't know.

Q. Now, the table, itself, was just a small table, was it not, three or four feet long?

A. Yes, sir.

Q. How would you say it compared with the size of the table that the reporter is writing on now?

A. I think it was longer than that.

Q. Would you say about two feet longer than that?

A. I don't recall the length of it.

Q. At any rate, the table was long enough that as she lay there on her back her feet rested on some part of the table, is that correct?

A. No, sir, her legs—at least, the knees were free.

Q. Then was she holding her legs out straight with her body, or did they droop over the edge of the table, as if one were sitting there?

A. They drooped over the edge of the table.

Q. Now, as they drooped over the edge of the table, that [fol. 1772] brought her feet how close to the top of the box containing the rattlesnakes?

A. I don't know that.

Q. Well, the box, as I understand it, had a lid, when it was taken and set down there, is that right?

A. Yes, sir.

Q. Was that lid removed?

A. No, sir.

Mr. Barnes: That has been answered before, your Honor.

The Court: Practically all of these matters have been answered before.

Mr. Clark: Yes, your Honor. This one in regard to the table, her head was up here. It may mean something to counsel.

Mr. Barnes: When the witness was being cross examined in connection with the black board, this witness was examined on that. I should have said "Exhibit 1".

Mr. Clark: Well, it is utterly impossible to make this intelligible without some repetition.

The Court: Well, I am ruling with you, Mr. Clark.

By Mr. Clark:

Q. Now, let me direct your attention, Mr. Hope, to an answer you gave heretofore. This at the top of Page 331, Mr. Barnes: "Mr. James had preceded me, and picked the lady's foot up, and pointed to this seat here in this breakfast nook. As the box was set down there, he stuck this foot in the box." I am now asking you if you were present [fol. 1773] when Mr. James put her foot in the box?

A. Her left leg.

Q. Whereabouts did he *sieze* hold of her left leg?

A. I would say about the calf.

Q. Did he take hold of the calf of her left leg with one hand, or both?

A. I don't know.

Q. Would you say that that was about eight inches above the heel?

A. I wouldn't be able to answer that.

Q. When he took hold of her leg in that manner, were you looking in the box?

A. Yes, sir.

Q. Was the rattlesnake coiled?

A. Yes, sir.

Q. Was it rattling?

A. I didn't hear it.

Q. You were within a few feet of it at that time, were you not?

A. Yes, sir.

Q. Now, having taken hold of the left leg near the calf, as I understand, he threw the leg into the box, is that right? Did he put the foot into the box?

A. The foot, yes.

Q. As he did that the foot was descending into the box in a perpendicular manner, wasn't it?

[fol. 1774] Mr. Williams: That is objected to as being uncertain in any event, because the particular portion of it, what is meant by perpendicular, doesn't mean anything.

The Court: The question is somewhat ambiguous.

Mr. Clark: Well, will you just tell us then—as I understand, the foot was not put flat into the box, with the sole of the foot down?

A. I wasn't watching that.

Q. You didn't watch that?

A. No, sir, I was watching the snake.

Q. And as you watched the snake you saw the snake strike is that right?

A. I saw the snake strike, yes, sir.

Q. And when you saw the snake strike you saw where the foot of Mrs. James was, didn't you?

A. Yes, sir.

Q. Where was the foot of Mrs. James when the snake struck?

A. In the box.

Q. What was the position of the foot with regard to its sole, in relation to the head of the snake?

A. It was above.

Q. The sole of the foot was above the snake?

A. As I remember it, yes, or on a line with it. I wouldn't know whether it was on a line with it, or slightly above it. I would say it was slightly above it.

Q. And you saw the rattlesnake strike upward, and strike [fol. 1775] that foot, did you?

A. He struck out.

Q. He struck out?

A. Yes.

Q. Well, was the foot directly above the head of the snake?

A. No.

Q. If we were to bring you a box of the same dimensions as that box was, could you show this jury the position which that foot was in at the time you saw the rattlesnake strike it?

A. I don't know whether I could or not; I could try.

Q. About how much higher was the table than the breakfast seat?

A. I don't know, Mr. Clark.

Q. Well, it was higher, wasn't it?

A. Yes, sir, it was just like any other breakfast nook, as far as I know.

Q. As I get the idea, the seat was so arranged that a person could sit upon it to use the table?

A. That is correct.

Q. That would mean that the breakfast seat was about one foot lower than the table, wouldn't it?

A. I wouldn't state the height of it; I don't know.

Q. Now, when the rattlesnake was coiled up, its head was only about three or four inches above the bottom of [fol. 1776] the box, isn't that true?

A. I don't know about that, either.

Q. When Mr. James thrust the foot into the box, did he thrust it deeply enough into the box that his hand went in, also?

A. I don't know. I told you I wasn't watching him or her, either.

Q. When the foot was thrust into the box, was the table tilted toward the box?

A. Not that I know of.

Q. Did Mrs. James struggle or move when the foot was being thrust into the box?

A. Not to my knowledge.

Q. Now, I am going to read another portion of your testimony, so you will understand what I am trying to get at.

Mr. Williams: What page?

Mr. Clark: 332, Line 5: "And then the foot was immediately pulled out, was it? A. It was, yes, sir. Q. Was it done something like this, placed in the box like that, and pulled out? A. Yes, sir. Q. Just about as I have described? A. No, sir, faster than that. Q. Just like that? A. Just like that, yes, sir."

Q. Now, by those answers you meant to indicate that the foot was in the box only an exceedingly short period of time, didn't you?

A. Yes, sir.

[fol. 1777] Q. Then it was moved in and out with almost lightening like rapidity?

A. Well, not quite that fast, please.

* * * * * * *

[fol. 1778] Redirect examination.

By Mr. Williams:

Q. Mr. Hope, did you tell the occurrence about this rattlesnake bite, and the fish pond occurrence, to anybody before you were placed under arrest?

Mr. Clark: Just a moment. That is objected to on the ground that it is immaterial, irrelevant and may call for hearsay testimony.

Mr. Williams: There is just a question in my mind as to whether the character of the cross examination has been such as to bring us within the recent fabrication rule. I am not at all insistent, because I don't know whether it has or not.

The Court: I think I will sustain the objection.

* * * * * * *

[fol. 1779] WILLARD L. KILLION, recalled as a witness in behalf of the People, having been heretofore duly sworn, testified as follows:

Cross-examination.

By Mr. Clark:

Q. Mr. Killion, referring to this day when you took Mr. James out and had the conversation with him while he was eating dinner, I think that was the 2nd of May?

A. Yes, sir. And into the 3rd of May.

Q. And running into the early hours of the morning?

A. Yes, sir.

Q. Now, when you took Mr. James up to La Canada, you were talking with him—by "you", I mean you or Mr. Gray were talking with him on the way up there, were you not?

A. Yes, there must have been some conversation.

Q. And do you remember what any of that conversation was?

A. I remember that we talked something about having something to eat and we decided that we didn't have time to stop for that. As I recall it we didn't have any conversation about the death of Mrs. James on that ride.

Q. That was what I was trying to get at. Now, you did get to 1329 Verdugo Road, I believe you stated heretofore. When you got there did you take Mr. James any place about the premises?

A. Yes, sir.

Q. Where did you take him?

[fol. 1780] A. To the back part of the premises near the garage and to the side of the fish pond.

Q. Did you have any conversation with him there at the fish pond?

A. As I recall it, the conversation had with him there was in asking him at what point on the edge of the pond—no, I am mistaken in that. It was Hope that was asked that question. I don't believe any conversation was had with Mr. James at the fish pond about it.

Q. You just took him out to where *the* could see the fish pond and came away, is that correct?

A. I do not wish to say no more conversation than that was held. Mr. Williams was there and many newspaper men and I do not wish to say that no conversation was held with him, but I do not remember any of the words that he said or that was said to him.

Q. Do you remember the substance of anything that was said to him there?

A. No, I don't recall of any conversation with him there.

Q. Now, do you recall any conversation with him on the way back?

A. About the same that was mentioned going to that place.

Q. There was no conversation in regard to the death of his wife or his making any statement concerning it?

A. As I recall it there was no conversation about the death of Mrs. James.

[fol. 1781] Q. Was he informed at any time on the way up, where he was being taken?

A. He was told that before we started from this building.

Q. Well, when you told him that, did you tell him why you were taking him up there?

A. No.

Q. And did you tell him why he was there while he was on the premises?

A. No, sir.

Q. And did you tell him why he had been taken there when he was on his way back?

A. I don't remember that.

Q. Did anyone—when I say "you", I mean it in the plural sense.

A. Not that I remember.

Q. Now, if you will oblige me by looking at the diagram here? I believe this is People's Exhibit 2. Do you recognize that as the premises there?

A. I do.

Q. And you recognize this walk around to the garage?

A. Yes, sir.

Q. And then you know the fringe of the walk that leads off in a westerly direction to a property line?

A. Yes, sir.

Q. And when you went out there, you went in back on the walk to the garage I have described?

[fol. 1782] A. That is true.

Q. And when you were going down there, you looked over toward the little pond, didn't you, to see what you could see?

Mr. Williams: That is objected to because in the former question he used the word "there"——

The Court: Reframe the question, Mr. Clark.

By Mr. Clark:

Q. While you were at the premises at 1329 Verdugo Road, it is true, as you walked back along the driveway, toward the garage, that you looked over toward the lily pond, did you not?

A. I don't know. I mean I do not know whether, when I was walking toward the garage, I looked towards the little pond. I went to the lily pond while I was on the premises.

Q. Did you make any observation while you were walking for the purpose of seeing whether or not the pond was visible?

A. I did that many times. On that occasion I don't remember whether I looked towards the lily pond or not.

Q. As a matter of fact, you could see that lily pond, particularly the south westerly portion of it, from many places along the walk there, couldn't you?

A. No.

Mr. Williams: Just a moment; I want to know what walk you are talking about. I object to the answer as uncertain.

The Court: In view of the answer, I am going to allow it.

Mr. Clark: I will make it so that even Mr. Williams will [fol. 1783] be satisfied. Directing your attention to the walk which leads down to the right of the house——

The Court: I think you might indicate that as the driveway.

By Mr. Clark:

Q. Yes, the driveway to the garage, you did observe that from that driveway you could look across and see the southwesterly portion of the pond, didn't you?

A. From a point on that driveway or by just saying the driveway, it wouldn't be true, because there are many places on the driveway that you cannot see the fish pond.

Q. The portions where you can——

A. The portions near the back part of the house, which would be this place——

Q. You are referring now to a point nearer the house—go ahead.

A. I would say within five or six feet north of the corner of the house, and looking down this walk, and you are able to see the northern end of the fish pond.

Q. And then, as you looked northerly along the direction line, more of the fish pond becomes in view?

A. No, that isn't true because of the shrubbery. As you walk north it is difficult to see the fish pond because of the shrubbery that is around this stone table and what shrubbery is north of the fish pond.

Q. Now, it is also true, is it not, that as you turn toward the west, at about a point indicated by a turn in a blue line that has been drawn on the diagram, until you get to a point [fol. 1784] opposite the center of the walk leading to the north of the premises, all along that area, you can see various parts of the fish pond, cannot you?

A. That is true.

Q. And as you go down the walk, which leads to the northerly part of the premises for quite a little distance along there—I may not mean quite a little distance, but 10 or 15 feet, you can look over and see the fish pond, cannot you?

A. I believe that is true.

Q. And when you go along the walk at the westerly edge of the premises, you can look through the shrubbery and see the fish pond at almost any point?

A. You might be able to see some portion of it through the shrubbery.

Q. Now, Mr. Killion, you remained with the defendant after he was taken to the District Attorney's office, during all the time until he went out to eat?

A. On my second trip, you are still talking about?

Q. Yes.

A. Well, I remained in one or the other of the two rooms. I wasn't with him every minute of those hours I spent there, but the greater portion of the time I was with him.

Q. At any rate, you accompanied him up to the room where he was in the District Attorney's office?

A. Yes sir, I did.

Q. And after getting there you remained there with him [fol. 1785] for some considerable period of time before you went out?

A. That is true.

Q. And during that interval of time, before you left that room, there were other people in the room also?

A. Yes, sir.

Q. And they were not just sitting there saying nothing?

A. No, sir.

Q. They were talking to Mr. James, weren't they?

A. Yes, sir.

Q. Now, you go ahead and tell us everything that was said to Mr. James up to the time that you first left the room?

A. Well, I will be unable to say which person said a certain thing, but, of course, I can remember about what was said in substance by some one of us.

Q. All right; just go ahead and tell us what your recollection is.

A. Well, he had been told that Mr. Hope had told the story of Mr. James' wife's death, and he was asked if he didn't want to tell his side of the story——

Q. Now, just a moment, before you go ahead. When he was asked if he didn't want to tell his story, his side of the story, wasn't it said to him in effect, that since they heard Mr. Hope's story, it would be better for them to hear his side of it too?

A. I am quite sure nothing like that was said.

Q. Well, he was told that if he told his side of the story [fol. 1786] at that time that they could better check on Mr. Hope's story?

A. I am positive nothing like that was said.

Q. Now, I don't want to weary you with a large number of questions. Was anything said to him at all as to what the effect of telling his side of the story would be?

A. No, sir. He was asked to tell his side of the story.

Q. Who asked him, if you remember?

A. I suspect all of us did at different times during this conversation.

Q. When he was asked to tell his side of the story the first time, what did he say?

A. I think he said that "That guy", referring to Hope, "is a damn liar and if you are going for that business", or words to that effect, "you will have to do it." As I recall, that was his reply.

Q. Did anyone reply to that?

A. Well, I can't remember as to that particular question. I mean I don't remember whether anyone replied to that particular thing or not.

Q. I wasn't there, of course, but didn't someone say, "Well, if Hope is a damn liar, you had better help us out by telling the truth"?

A. No, that isn't true, Mr. Clark.

Q. Did anyone say in effect, "Well, if Hope is a damn liar, the best thing for you is to tell us the truth, so we [fol. 1787] can investigate it"?

A. No, that is not true.

Q. Anything said to the effect that if he did tell the truth, that it would be investigated?

A. That it would be investigated?

Q. Yes.

A. I don't believe I understand what you mean.

Q. Was it said to him "Well, if you will tell your story now, we will investigate what you tell us"?

A. No, I don't remember that being said.

Q. Well then—of course, it is impossible for you to give the conversation in sequence, just as it occurred, but just go on and tell us what else you can remember that was said to him in that conversation.

A. Well, it was a long conversation. It was broken at intervals by some silence.

Q. Just a moment. When you say it was broken at intervals by some silence, do you mean that there were some times when Mr. James just quit answering questions?

A. No, I don't mean that at all. I mean, as you have intimated, that there was questioning for several hours, and during those several hours there were many times when nothing was said by James or by the other people who were present.

Q. All right. Now, let's have any of the other things that were said to him, if you remember.

A. Well, he was asked questions as to things about his [fol. 1788] wife's death. As I remember it, he might have been asked "Well, what did you do with the snakes? Where did you get the snakes and where did you go on a certain occasion?" and matters of that sort.

Q. Now, he denied getting any snakes, didn't he?

A. Yes, he did.

Q. And when he denied getting the snakes, some question after such denial, would be asked him as to what he did with them, wasn't there?

A. It might be possible that he was asked what he did with the snakes.

Q. His questioners kept on assuming that he got the snakes, during that entire time, didn't they?

A. Well, I don't know what the other questioners did.

Q. You heard them, didn't you?

A. Yes, but I don't know what they assumed.

Q. During that period was he asked anything about his wife's body being in the fish pond?

A. Yes, sir.

Q. What was he asked about that?

A. I can't tell you, in words.

Q. Well, give me the substance, as nearly as you can.

A. He was asked when the body was put in the fish pond and by whom.

Q. He told you he didn't know, didn't he?

A. Well, in substance, yes.

[fol. 1789] Q. He wasn't there?

A. That is what he said.

Q. And when he said that did anyone tell him that he was a liar?

A. No, sir.

Q. Did anyone tell him that they had the goods on him?

A. No, sir.

Q. Then what were some of the other things that were asked him?

A. Well, if this is a satisfactory answer, about everything that is in Hope's story was asked him.

Q. And he denied every bit of it, didn't he?

A. No, I wouldn't say every bit.

Q. What do you remember that he didn't deny first?

A. Well, he admitted that he knew Hope and that Hope had been up there and he said that Hope was a medical student and that Hope had used his automobile on different occasions. Those were some of the things that I remember that he didn't deny.

Q. But he did deny having discussed killing his wife with Hope, didn't he?

A. Yes, he did.

Q. He denied being in any way concerned with his wife's death, didn't he?

A. Yes.

Q. He denied all knowledge of her being dead until her [fol. 1790] body was found in the fish pond, didn't he?

A. Well, I don't know that that was asked him. In substance, I suppose he did.

[fol. 1791] Q. He denied having any wish to see his wife's death, didn't he?

A. I suppose in thought, at least, he did. I don't know that that was asked him.

Q. He stated that he loved his wife, didn't he?

A. I don't think he did on that occasion, no.

Q. Well, now, the answer that you gave a moment ago, when he was asked nearly everything concerning the matter, covers the whole conversation up to about the time that he went out to dinner?

A. As I remember it, it does.

Q. What was said to him just before he said that he would make a statement?

A. He called to me. At that particular time there was no one in the room except Mr. Gray, Mr. Hope and myself.

Q. Mr. Hope do you mean?

A. Mr. James, Mr. Gray and myself. The three of us were the only people in the room. Mr. James said, "Say, can't we go out and get something to eat, and I will tell you the story?"

Q. Now, it had been prearranged that you and Mr. Gray would be left alone in that room with Mr. James, hadn't it?

A. No, I am sure it had not.

Q. If it had, you had no knowledge of it?

A. That is right.

Q. How long continuously had you been in that room with [fol. 1792] Mr. James before Mr. James said this?

A. Do you mean alone?

Q. Yes.

A. A very short time; a few minutes, I would say.

Q. Both you and Mr. Hope had been out of the room for some time?

A. You mean Mr. Gray?

Q. You and Mr. Gray, I mean. That evens things up. You corrected my mistake one time, and I corrected yours another.

A. Thank you.

Q. You and Mr. Gray had been out of the room for some interval of time, and both came back just before he said this?

A. No, that isn't true. We had been in the room for some time, but the other persons who had been in the room with us had departed.

Q. How long would you say you and Mr. Gray and Mr. James were in the room there alone before he said this?

A. I would say five or ten minutes.

Mr. Clark: I hope your Honor will indulge me this one purpose:

Q. Will you tell me once more, and just as nearly as you can remember in the words used by Mr. James, what it was that he said in regard to making a statement? I don't want to suggest or intimate anything in my question. I want it to come from you as nearly as you can reproduce the words. [fol. 1793] A. In substance—I can't remember the words, but in substance he said, "Can't we go out and get something to eat?"

Q. Is that all?

A. Just a moment.

Q. Pardon me. I didn't mean to interrupt you.

A. Or to the effect that, "If you fellows—" and I got it from that that he meant Mr. Gray and me— "—will take me out to eat now," he said, "I will tell you the story."

Mr. Clark: That is all.

Mr. Williams: Did he make that suggestion himself?

A. He did.

Q. You didn't tell him——

Mr. Clark: Pardon me; just one further question:

Q. When he said that you said you would take him out, didn't you?

A. I said, in reply to that, "Why, sure, I think we can go out and get something to eat."

Q. And then you took him out?

A. After a short time, yes.

Mr. Clark: That is all.

Redirect examination.

By Mr. Williams:

Q. Mr. Killion, all of this that you have been telling in [fol. 1794] response to Mr. Clark's questions are things that happened prior to the defendant making the statement concerning which you testified last Friday?

A. Yes, sir.

Q. And the statement that he made, concerning which you testified last Friday, was the one that he made after you and he and Gray and Davis and the young lady that was with you had your dinner?

A. That is right.

Mr. Williams: That is all.

Recross examination.

By Mr. Clark:

Q. My attention has just been called to something that I overlooked. When I make that statement, your Honor, I don't mean that my attention has been called to any fact that I overlooked, but to some interrogation that I should have made. Some reference was made as to public opinion, while Mr. James was waiting up there, wasn't there?

A. I don't know what you mean, or where you mean.

Q. I mean while Mr. James was up in the District Attorney's office, before he made any statement, wasn't it said to him that public opinion was much aroused, and he had better look out; the kind of stories that he was telling weren't doing him any good?

A. No, sir.

[fol. 1795] Q. Was any part of that said?

A. Not in my presence.

Q. Was any reference made to Public opinion at all?

A. No, sir.

Q. Or anything said to him to the effect that what he had been telling wouldn't do him any good?

A. Nothing like that was said while I was there.

Q. Was any reference made to mob violence?

A. Not in my presence.

Q. Or was he told that he might need protection against the public?

A. No, sir.

Mr. Clark: That is all.

Mr. Williams: That is all, Mr. Killion. Call Sam Grant.

Sam Grant, recalled as a witness in behalf of the People, having been previously sworn, testified as follows:

Direct examination.

By Mr. Williams:

Q. Mr. Grant, were you in the barber shop at 822 West 5th Street, of which James was the owner, on Monday morn-

ing, the day upon which Mary James' body was discovered in the fish pond?

A. Yes, sir, but you have the address wrong. It is 522 West 8th Street.

[fols. 1796-1863] Q. Did I say "822"? I always get all the numbers in, but get them mixed up someplace. What portion of that day were you in the barber shop?

A. I was in all day, with the exception of when I was out to lunch, and I don't recall if I was out for any errand, or not.

Q. Do you remember the time when Mr. James went to lunch on that day?

A. Yes, sir.

Q. About how long was he out to lunch?

A. I would judge about half an hour, approximately half an hour.

* * * * * * *

[fol. 1864] MOTION TO STRIKE

Mr. Clark: I also move to strike out all of the testimony of Grace Yarnell which begins upon page 808 and ends upon page 824, and also her subsequent testimony which begins upon page 1061 and ends upon page 1063; for the same reasons, that the evidence is irrelevant and incompetent.

The Court: Without pausing to rule on that, Mr. Clark, just run right through the other Colorado testimony and then I will rule upon them in a group, unless you want a ruling upon each one separately.

Mr. Clark: I also move to strike out all the testimony of Gerald Rogers, which begins on page 824 and ends on page 862, the testimony of Dr. George B. Gilmore, which begins upon page 864 and ends upon page 888, the testimony of Alva E. Custer which begins upon page 890 and ends on page 901, the testimony of Mrs. Irene Snyder which begins upon page 902 and ends upon page 911, the testimony of G. B. Dunnington, which begins on page 911 and ends on page 922, the testimony of Mr. John A. McKelvey, which begins upon page 922 and ends upon page 926, the testimony of Mr. C. A. Pries which begins upon page 927 and ends upon page 967, the testimony of Mr. Bayard Judd, which begins upon page 981 and ends upon page 990.

The Court: May I just inquire who Bayard Judd was?
[fol. 1865] Mr. Parsons: The Kansas City Life Insurance Company representative.

The Court: Oh yes, I have it.

Mr. Clark: The testimony of Doctor Charles Decker, which begins upon page 1297 and ends upon page 1341. I haven't included in the present motion his testimony when he was recalled. That is all I think in that group.

The Court: These motions taken separately and considered severally each and every one of them is denied.

Mr. Clark: Now, I move to strike out, upon the same ground, namely, that they are incompetent, irrelevant and immaterial, all of the exhibits beginning with Exhibit No. 39 and ending with Exhibit No. 61, produced by the People, on the ground that they are incompetent, irrelevant and immaterial.

Mr. Barnes: That would not include 50 and 51, would it?

The Court: They are not in.

Mr. Clark: I have 50 and 51 marked as having something to say in regard to them.

The Court: They are for identification only. Treating the motion as being made separately and severally as to each one of the exhibits as though they were taken up individually, each one of those motions will be denied.

Now, I was under the impression, Mr. Clark, that there was another exhibit in here somewhere—did you include Exhibits 71 and 72?

Mr. Clark: No, your Honor, I did not.

[fol. 1866] The Court. I will assume that you have made motions as to those exhibits also.

Mr. Clark: Thank you.

The Court: And those motions are also denied. Those refer to the Kansas City Mutual Life Insurance Policy. I think the record is protected with reference to the Colorado transaction.

Mr. Barnes: Have you finished?

Mr. Clark: No, there is one other motion, but I didn't have time this afternoon to locate it in the transcript.

The Court: I wonder if we might not bring the jury down and excuse them for today?

(Discussion at counsel table.)

Mr. Barnes: That was the testimony of the witness, Hughes. That testimony was read by myself in the place

and stead of Mr. Hughes. It may be agreed that it was the testimony of Mr. Arthur Hughes, the court reporter?

Mr. Clark: I move to strike out all of the testimony of Arthur Hughes, as read from his shorthand notes, by Mr. Barnes, upon the grounds that it also is incompetent, irrelevant and immaterial.

The Court: Have we a reference to the pages?

Mr. Barnes: I can give you the page approximately. 556 to 591. I take it, however, there is no objection that the testimony was read by myself rather than the witness, Hughes?

Mr. Clark: There is no question about that. It is just the [fol. 1867] same as if Mr. Hughes had read it and testified to it at length.

* * * * * * *

Mr. Barnes: We have two more exhibits to offer. May we do that now before your Honor adjourns or would you prefer that we take it up in the morning.

The Court: You may do it now if you want to.

Mr. Barnes: That is Exhibit 50 and 51. Exhibit 51 is the sketch drawn by Gerald Rogers and 50 being identified by the witness, Yarnell, as a letter written to the insurance company on behalf of the defendant, the original of which we promised counsel we would have and which we did show [fol. 1868] to them during the course of the examination. Exhibit 50 is the photostatic copy of it.

Mr. Clark: 50 is the letter?

Mr. Barnes: Yes.

Mr. Clark: As to that we object on the ground it is incompetent, irrelevant and immaterial. And as to 51, we object on the ground it is irrelevant and immaterial.

The Court: Both Exhibits will be received in evidence.

* * * * * * *

Mr. Clark: The motion to strike Mr. Hughes' testimony, I believe is now pending.

The Court: That motion will be denied.

Mr. Clark: I now move to strike out all of the testimony of the witness, Killion given subsequent to his voir dire examination, and particularly that portion of his testimony which relates to the alleged conversation between him and the defendant on the 2nd or 3rd of May at a

restaurant where the defendant was taken to eat, on the ground that it appears that the statements then made were not freely or voluntarily made but were the result of force, threats, duress, intimidation and inducements.

[fol. 1869] The Court: Have you finished, Mr. Clark?

Mr. Clark: Yes, your Honor.

The Court: The motion will be denied.

Mr. Clark: I now move to strike out all of the testimony of Dorothy Adams with relation to a conversation in which the defendant took part, upon the ground that no foundation was laid for the introduction of said testimony, by showing that the statements were free and voluntary, but that it now appears that the statements made by the defendant there were induced by force, threats, intimidation, duress and inducement.

The Court: Same ruling. Motion denied.

Mr. Clark: I guess I have moved to strike about everything, haven't I?

The Court: There is still a little you might operate on.

Mr. Barnes: I think there was one witness gave an address that you overlooked.

Motion for Directed Verdict

Mr. Clark: I now move that the Court direct the jury to acquit the defendant upon the ground first, that the corpus delicti has not been established by other evidence than the statements and admissions of the defendant, secondly, upon the ground that the alleged confessions of the defendant made to Mr. Killion and at the District Attorney's office are exculpatory and insufficient to show the commission of a crime by him and that as to his alleged confession made to Mr. Hope that it is the testimony of an accomplice, a confession claimed to have been [fol. 1870] made by an accomplice, uncorroborated by any testimony tending to connect the defendant with the commission of the offense.

The Court: That motion will be denied. The reason of the Court is that it is the opinion of the Court that the confessions are admissible, that the corpus delicti has been established, for the further reason that the motion for an advised verdict is premature, the defendant not having rested. However, may I say this: If the defendant had

rested, so that there will be no need for further presenting the matter, if the defendant at this time had rested and requested the Court to acquit, the Court would, at this time, deny such a motion made under those circumstances.

Mr. Clark: Thank you, your Honor. That will relieve me from the necessity of presenting the motion further.

Now, this had not been placed in legal form, but we on receiving information communicate it to your Honor. We are in receipt of information that warrants the belief on our part that by taking depositions in Colorado Springs, Colorado, we can contradict some of the facts deemed material here, testified to by the witnesses for the prosecution, and particularly that we can contradict the testimony of Mr. J. D. Rogers concerning the apparently intoxicated condition of Mrs. James, and we move for a reasonable continuance to give us an opportunity to take the deposition of the witness who has communicated with us and such [fol. 1871] other witnesses as we may find at Colorado Springs. In making this motion, if the Court deems it necessary to deny the motion by reason of a failure to support it by affidavit, we offer, either by affidavit of all testimony to prove the things that I have stated in regard to the communication we have received and what we can establish by that. That is all.

The Court: I think counsel will agree with the Court that the showing thus made is one which the Court would have to say as a m-tter of law is insufficient. Counsel also understands that this does not indicate any hesitancy on the part of the Court to accept any statement of counsel, but I think the showing should be made in the regular manner. In other words, the various elements of the grounds for a continuance should be shown by the evidence and the Court thus placed in the position so that if the showing for a continuance seemed sufficient to the Court that upon the Court granting it the record would show that and if the ground seemed insufficient and the Court denied the motion it would also be completely a matter of record.

Mr. Clark: Yes, your Honor, I think that all your Honor has said is perfectly true. Shall I put in all testimony?

The Court: If you want to run beyond the usual time, I am willing to run until 5 o'clock if you want to.

Mr. Clark: It will not be necessary to run that long, your Honor.

ROBERT S. JAMES, recalled on voir dire examination, and testified as follows:

[fol. 1872] By Mr. Clark:

Q. Mr. James, I hand you a letter and envelope, and ask you if they came into your possession during the course of this trial?

A. Yes.

Q. And directing your attention to the envelope and the post mark, "June 24th", when, with relation to that date, would you say that you did receive that?

A. I received it when I went to my tank one day last week.

Q. And at the time you received it was the letter in the envelope?

A. Yes, sir.

Q. Now, do you recognize the writer of the letter as any one you knew in Colorado?

A. I remember the man at the top of the Peak that day. My wife and I visited him just before he left the top of the mountain.

Q. Did you remember his name before you received the letter?

A. I don't believe I would remember his name, unless he called my attention to it in the letter.

Q. And he called attention to it in the letter?

A. Yes, sir.

Q. And upon receiving the letter did you hand it to me as soon as you had an opportunity to do so?

A. I did.

[fol. 1873] Q. Now, do you recall any of the other people that you saw either at the Peak, or at the scene of the accident that occurred after you left there, who have not been here in court?

A. Do I recall any of them?

Q. Yes.

A. Well, right off hand I don't think I do.

Q. During the time that your wife was in the hospital, was she conscious?

Mr. Barnes: Just a minute. I object to it on the ground that this is a showing with respect to the matter about which we have just been talking.

Mr. Clark: Why, surely. The purpose is to show that prior to her death Mrs. James was conscious, and that he

had tried to get other names so that we might proceed to take their depositions, and prove by them that she never claimed that this defendant assaulted her. That is the purpose of the question.

Mr. Barnes: Well, we will submit that that is not a question about an injury.

The Court: I submit it is somewhat of an inquiry as to who is the writer of the letter.

Mr. Clark: Yes, Your Honor.

The Court: I hate to say what I am going to, because it may seem unnecessary, but I don't think there should be any doubt about it, but I think it should be in such form that [fol. 1874] it in effect was this, that the party if called as a witness would state thus and so, and stating what the witness would testify to——

Mr. Clark: Well, your Honor——

The Court: —and I expressed that in the showing of that it would be insufficient. So the mere showing that there were some people that talked to Mrs. James at the hospital, unless it was submitted to what those people might be called to testify to——

Mr. Clark: Your Honor, may I make the counter suggestion that it seems to me that the fact that she was conscious and talked to by people at the hospital, was a probable fact. What she said to them is hearsay, if we cannot prove it, but that she did talk to them, was conscious, was able to make charges against her husband, seems to me to be probable facts. That is why I proceeded this way. If, having suggested to your Honor what I have, your Honor is still of the opinion that you have just expressed, I shall bow in deference to your Honor's view.

The Court: You may proceed.

By Mr. Clark:

Q. Was Mrs. James conscious while she was at the hospital?

A. She was conscious the next morning at 7:00 o'clock.

Q. And she remained conscious until the time of her death?

A. She did.

Q. Do you know the names of the nurses who attended her?

[fol. 1875] A. No, I don't remember their names now.

Q. Do you know of any visitors that she had after the accident, either at the hospital or at the house?

A. Well, her father visited her.

Q. Where is he now, do you know?

A. He is in Fargo, North Dakota.

Q. Any one else?

A. Mrs. Yarnell and her two daughters visited there.

Q. That is the daughters that have testified here?

A. Her daughter. Her mother is in Colorado Springs.

Q. Do you remember any others?

A. Well, the Doctor that attended her was there every day.

Q. Who was the doctor?

A. Well, I heard his name the other day, but I don't remember his name now. If you told the name I would know.

Q. May I offer the letter and envelope?

The Court: Mark it Exhibit A on the motion.

Mr. Clark: I have nothing further to present, your Honor.

Mr. Williams: I have no questions.

A. Is that all?

[fol. 1876] The Court: Just one question, Mr. James: You referred to the daughters of Mrs. Yarnell. Was it one of the daughters that testified here?

A. That was one of the daughters.

Q. She was one of the daughters that visited your wife?

A. Yes, sir.

Mr. Barnes: We resist the motion, if the Court please, on the ground that there is no proper showing made, and all the evidence except that referred to in the letter, is merely cumulative, the witness Yarnell having testified in effect that the wife was conscious and nobody has suggested anything to the contrary, and as a matter of fact, there is no showing what the other witnesses may testify to.

The Court: May I see the letter?

Mr. Williams: Now, as far as the matters contained in the letter is concerned, it is a matter which may or may not have any significance. Even as indicated in the letter, it is indicated that the victim, Winona James, could have been drunk at the time of the accident. In addition to that, this matter was called to the attention of the defendant and

apparently it was brought to the attention of the Court in the middle of last week——

Mr. Barnes: July 9th.

Mr. Williams: —several days ago, and there has been no additional investigation made by the defendant, and there has not been any effort to secure a stipulation that the [fol. 1877] deposition might be taken back there. There isn't any specific showing as to what the witness would testify, except in general appearance. I do not think there is that showing of diligence by showing that the evidence is important or the requisite statement as to the showing as to what the witness would testify to, which is required by the law.

I certainly was prepared when counsel brought the matter up last week—counsel said to call it to the attention of the Court in my presence and I stipulate to the taking of a deposition at any time, and no such request was made, my thought at that time being that the deposition could be taken by the telegraphic expert and returned to this jury without the necessity of continuance.

This was known in the opening statement to the jury in this case. The defendant and his counsel knew that evidence touching the death of Winona James would be offered in court by the prosecution. At that time every opportunity was presented to him to make any investigation they desired, and to request either from the Court or from counsel as to whether a stipulation to the effect that the depositions might be taken. No one of those things were done.

It seems to me that it is my desire that this defendant should have every right which the law gives him, and I do not think we have the right to delay this trial at this late date and for the purpose suggested by the writer. For that reason we are opposed to the application.

[fol. 1878] Mr. Clark: If your Honor please, this defendant has not been shown in this case to be a—there is no reason for counsel for the prosecution taking that stand. He has brought into this court evidence of another offense which it is claimed took place more than four years ago, more than a thousand miles from the court room. Isn't the right of the defendant to have a trial by a jury of those in the county, which means in the community. That constitutional right exists by reason of the very great law that if justice be done, the defendant is entitled to bring his witnesses into the courtroom. It is true that counsel ad-

vised us of their intention to offer this evidence. It is also true that we were firmly convinced that the evidence could not be gotten under any conceivable set of facts, and being so convinced, we had *a*no reason to anticipate that your Honor's views would differ from ours——

The Court: I don't think you are really right on that, Mr. Clark. If you wanted to do it you should have said, "We have the testimony and we want a continuance to get it."

[fol. 1879] Mr. Clark: Well, outside of the burden of a strenuous trial, where counsel have the reponsibility of a man's life upon their shoulders, they can do just one thing at one time. They have to concentrate on all the facts that are being produced. Among the three counsel who are representing the defendant here, we could not be expected to go to Colorado Springs. If we had the time and the money perhaps we could do that. Those things we have not, and we had no need for the deposition until we reached this stage of the case. I will take the broad position that where, as here, an attempt is made to prove the issues of another crime largely separated from the place of trial, and largely separated from the time of trial, that when that attempt is made then the defendant has a right to a reasonable continuance in order to get that evidence which he cannot reasonably get now, and which he should have. He doesn't know from the Indictment that he was going to have that evidence to get.

The Court: I think you are overlooking this fact, Mr. Clark, that when the opening statement was made the District Attorney declared what he was expecting to prove, and the objection was made, and the Court made a ruling that at least the possibilities were that that testimony would be received if offered. It seems to me that that was the time that the fact was presented, and the Court should have been informed of the fact that a continuance might be necessary.

Mr. Clark: If your Honor will remember, we restrained [fol. 1880] from answering at that time. We stated that the defendant was in court with his counsel. We have never answered for that reason.

The Court: I don't think that is the situation at all.

Mr. Clark: I think——

The Court: I think the law is too well settled, that if you want to take a deposition—well, I am not worrying about

that situation. If an effort was made to conduct the investigation to ascertain whether there was such information—I am satisfied that counsel made that effort—but we do not know that there is such a person, or the person who wrote the letter is the person that Mr. James wrote the letter to at all.

Mr. Clark: May I say this: We have received in this case a small number of crank letters, and an extraordinary number of letters tending to call our attention to suggestions. Most of them—they make a decided difference in the evidence that we are going to produce here. I think perhaps without going out of bounds to say that this defense, even though your Honor denies the motion, will be more responsive——

The Court: That may be true, but we are ruling on a question. I am satisfied there is no reason for the motion.

Mr. Clark: If any person wants a discussion, he must take his position, your Honor. He may not be late. The point that I make is that we had no notice that we wanted a continuance, by reason of counsel's opening statement, [fol. 1881] and not intending to reflect on your Honor, but I at least had no reason to believe for a moment that if we had a discussion at that time that we could get it. That is not the first opening statement, your Honor—if we asked for a continuance to get all the things that are said in the opening statement, your Honor knows that the administration of justice would be greatly delayed. Frankly, I don't think that we will put on a demand for a continuance, until your Honor denies the motions.

Now, we have reached our defense. Now, your Honor has ruled that all the facts before your Honor, as to the admissibility of this evidence—it was well decided during the course of the case that the Court can tell the necessary foundation will be laid.

[fols. 1882-1883] We believe that we have made our application properly and that it is sufficient. We have presented it therefore to the Court in good faith. If the Court thinks that we haven't made it promptly your Honor must deny it. We are willing to submit to whatever ruling your Honor thinks is proper.

The Court: The motion for the continuance will be denied because of the insufficiency of the showing.

* * * * * * *

[fol. 1884] JOE HOUTENBRINK, called as a witness in behalf of the defendant, having been heretofore fuly sworn, testified as follows:

* * * * * * *

[fol. 1885] Mr. Clark: Will your Honor indulge us for a moment? Mr. Moore, are those two rattlesnakes here?

Mr. Williams: Do you want the rattlesnakes?

Mr. Clark: Yes.

Mr. Williams: They are down in the squad room.

Mr. Clark: Well, suppose we bring them here now. We won't have them in here longer than necessary and not to make any spectacular display.

Mr. Williams: We didn't know that you wanted them this morning.

Mr. Parsons: It is my fault. I should have told you last night.

Mr. Clark: Shall I proceed, your Honor, as best I can while the snakes are on the way?

The Court: If you can proceed without them, you might.

Mr. Clark: I think I can. I might find that I don't really need them at all. It is a matter of precaution that I am having them brought.

Direct examination.

By Mr. Clark:

Q. Mr. Houtenbrink, certain snakes were brought in to the courtroom here and received as an exhibit. Has your Honor the exhibit number?

The Court: I can get it in a moment here.

The Clerk: Exhibit 20.

Mr. Clark: Thank you.

[fol. 1886] The Court: 20 is right.

Mr. Clark: Received here as People's Exhibit No. 20. You saw those snakes of course, when they were here?

A. Yes, sir.

Q. You have been, as I recollect your testimony, dealing in reptiles, handling rattlesnakes, buying, selling and keeping them over a term of years?

A. That is right.

Q. And you have learned, have you not, as a result of that experience that rattlesnakes do not ordinarily live long in captivity?

A. Oh, I should say not long, five to ten years.

Q. As a matter of fact, Mr. Houtenbrink, isn't it true that the average life of a rattlesnake in captivity is less than one year?

A. Well, that all depends on the party that is handling them.

Q. Isn't it true that the average length of life of the rattlesnake in captivity that you have handled doesn't exceed three months?

A. I should say at least two years.

Q. You are quite sure that the rattlesnakes that you sold Mr. Hope weren't dead when this trial commenced, are you?

A. No, sir. I say this is the snake that Mr. Hope bought.

Q. And those snakes came into your possession first when?

A. That would be hard to say because I didn't have any-
[fol. 1887] thing to check it up by, but let's say two months anyway.

[fol. 1888] Q. You mean two months before you sold them to Mr. Hope?

A. Certainly.

Q. Did you catch them yourself?

A. No.

Q. Where did you get them?

A. I would hate to say the names, because there are competitors of mine in this courtroom who would like to know the names of the persons I buy my snakes from.

Q. Unfortunately I believe that the answer is necessary. I shall be obliged to insist on the answer.

The Court: You may answer.

Q. All right. Mr. S. H. Walker, Indio, California, one of my collectors.

By Mr. Clark:

Q. And did you receive any bill of lading, or notice of express, with relation to the delivery of these snakes?

A. No, all you do is just sign when the shipment comes in, sign your bill, and pay your freight, and take out the snakes.

Q. Do you have now any bill of lading, or any other paper, relating to the purchase by you of these two snakes?

A. I don't just get two of them in a box.

Q. I mean the two that were brought here into the courtroom.

A. It would be very hard to say, because there might be 20 of them come in one shipment.

[fol. 1889] Q. As a matter of fact, do you know whether you did receive 20 in the same shipment that these came in?

A. No, certainly not; I couldn't say that.

Q. You have a distinct recollection of the shipment in which you received these snakes, haven't you?

A. Not necessarily, no.

Q. You say "not necessarily", but as a matter of fact, have you?

A. No. How could I?

Q. It is true, is it, that you don't know how many snakes you bought at the same time you bought these two?

A. No, unless I look over my records.

Q. Do you know whether you bought any others than these two at the time you bought these?

A. No, I maybe bought some more. I am very sure that I did, because it is very seldom that a shipment comes in with just two snakes. There is always 20 or 30 snakes in a shipment.

Q. Now, you have been buying snakes within the last few months, haven't you?

A. Yes.

Q. The snakes you have been buying in the last few months have included snakes of the same species as the two that are here in the courtroom, haven't they?

A. Certainly.

Q. They have included snakes of the same size as the two [fol. 1890] here in the courtroom, haven't they?

A. Well, yes.

Q. Now, do you buy rattlesnakes so much per snake, so much per pound, or how?

A. No, we buy them in pounds.

Q. And the market price of rattlesnakes last August was how much per pound?

Mr. Williams: Do you refer to the wholesale or the retail price?

Mr. Clark: I am referring to the price that he paid, that he and other dealers paid.

A. We pay as low as 25, and then also we pay 35.
Q. And sometimes you pay 75, don't you?
A. No, I never do pay 75.
Q. These are about 3-pound snakes, are they not?
A. There was a little bit over 6 pounds.
Q. For the two?
A. Yes, a little bit over.
Q. And the market price, the price that you were paying, at the time the snakes were sold to Mr. Hope, was 2[illegible] cents a pound?
A. Either 35 or 25.
Q. That was net to the man that sold the snakes to you?
A. Yes. And I paid the extra charges, and for the keeping of them.
Q. And the extra charges upon snakes is one and a half, [fol. 1891] or two times——
A. No, one and a half——
Q. One and a half is the highest classification for express from there that is correct, isn't it?
A. Correct.
Q. You have no objection to my removing the sack, have you?

Mr. Williams: No.

By Mr. Clark:

Q. Have you been keeping these snakes in this same box ever since you brought them back from Mr. Hope?
A. No.
Q. Where have you kept them?
A. In a cabinet, something similar to it. They have a glass front, and the rest is all wood.
Q. And they were kept at your place of business?
A. Correct.
Q. And you were keeping a lot of other snakes at your place of business?
A. Not a large number, but——
Q. From that time down to the present——
A. If you want to know how I know this, that these are the snakes——
Q. I want you to answer my questions. Will you do that?
A. Yes, sir.

Mr. Williams: May I suggest that this witness has not been asked a question, although he is put on for direct examination.

[fol. 1892] Mr. Clark: I don't like counsel——

The Court: If Mr. Williams wants to object, he may object, and the Court will rule upon it. Otherwise, we will get along with the examination.

Mr. Clark: Will you please read the last question and answer.

(Record read by the reporter.)

By Mr. Clark:

Q. And you were keeping a large number of other snakes in the same place of business?

Mr. Barnes: That is objected to as leading.

The Court: Overruled; you may answer.

A. Not at that time, no.

By Mr. Clark:

Q. Well, between that time and the present you have had many snakes, haven't you?

A. Yes.

Q. Many of these snakes were snakes of this same breed?

A. Yes, certainly.

Q. And many of this size?

A. Not many of them, no.

Q. Now, did you put any identifying mark upon any box, or the place where you kept the two snakes that you sold Mr. Hope?

A. No, but I moved——

Q. No, but answer the question.

The Court: Just answer the questions; we will get along all right. Just answer the questions as direct as you can.

[fol. 1893] A. Sometimes, you know, I am explaining how I know it.

Mr. Clark: Well, Mr. Williams will bring it out on his examination.

The Court: Before we get through we will know it.

By Mr. Clark

Q. You did have snakes die during the last year, didn't you?

A. Yes, sir.

Q. And you had snakes of this species die, didn't you?

A. No.

Q. None of the snakes of this species?

A. None whatever.

Q. And the snakes you sold to Mr. Hope, and bought back, you have them?

A. Yes, sir.

Q. What are the things that the snakes have been fed?

A. The best thing is kangaroo rats and small Cottontail rabbits.

Q. And that is what you feed them?

A. Yes, sir.

Q. Those in the courtroom?

A. They haven't been fed since they have been put in the cage.

Q. Now, when, as near as you can fix the time, is the last time you did feed them?

A. Well, that would be hard to say, and it is something—you know, I was not expected to be called here to answer [fol. 1894] such a question.

Q. Your answer is, then, that about that part of it you are not able to answer that now?

A. Yes, that is it.

Q. You sometimes feed them milk, don't you?

A. Milk?

Q. Yes.

(Witness laughs.)

Q. Well, you have had a good laugh. Will you answer the question?

A. Never.

Q. Well, you are not the man, then—you didn't place the bottle of milk close to the snakes in the courtroom?

Mr. Barnes: I don't think that is material.

Mr. Clark: That is all.

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[fols. 1895-1903] FRANK WEINBERG, called as a witness in behalf of the Defendant, being first duly sworn, testified as follows:

* * * * * * *

Direct examination.

* * * * * * *

[fols. 1904-1906] Mr. Clark: Will you just describe the symptoms of a rattlesnake bite as you have observed those symptoms on yourself and others.

A. In the bite you get a sting like two red hot needles would go into you. That is the only pain you get. That pain stays there for maybe 10 or 15 minutes and then after that other complications set in.

* * * * * * *

[fol. 1907] Q. Now, you spoke about two punctures. How [fol. 1908] does that come about?

A. Well, a snake has two fangs, and the two fangs go in the flesh.

Q. Now, what are rattlesnakes' habits in regard to striking? Does the snake strike from being stretched out his full length, or how?

A. The snake has to get what we call a foot-hold, the same as if you would see a prize-fighter, if you hang him up in the air, he couldn't punch you. He has to have a foot-hold, so when a snake coils, one-third of the length does all the striking. Once in a while when a big snake is angry, it might strike one-half of the length of the body.

Q. I believe there has been evidence in this case to the effect that the running snake might be able to strike, and to strike farther than the length of his body.

* * * * * * *

[fols. 1909-1920] Q. Now, the fangs, are they saw-tooth, or smooth? Are they like the edge of a saw, or are they smooth?

A. They are smooth, round and smooth.

* * * * * * *

[fol. 1921] Eva Murphy, recalled as a witness in behalf of the Defendant, having been heretofore duly sworn, testified as follows:

Direct examination.

By Mr. Parsons:

Q. Mrs. Murphy, will you please talk so we can all hear you?

[fol. 1922] A. Yes, sir.

Q. You have been previously sworn, have you not?

A. Yes, sir.

Q. And the defendant here, Robert S. James, is your brother?

A. Yes, sir.

Q. And you reside in Birmingham, do you?

A. In Morris, Alabama.

Q. That is out of Birmingham?

A. Yes.

Q. What is your occupation there?

A. I am evening chief operator with the telephone company.

Q. Directing your attention to July, 1935, did you visit your brother?

A. Yes, sir.

Q. And where did you visit your brother?

A. At the residence at 1329 North Verdugo Road.

Q. La Canada?

A. Yes, sir.

Q. You came here from Alabama, did you?

A. Yes, sir.

Q. And when did you arrive?

A. On June 30th.

Q. June 30th?

A. Yes, sir.

Q. By whom, if anybody, were you met when you arrived [fol. 1923] in Los Angeles?

A. I was met at the station by Mr. and Mrs. James and Mr. and Mrs. Smith and Lois Wright.

Q. By Mr. and Mrs. James you mean your brother and his deceased wife, Mary?

A. Yes.

Q. And they met you at the train?

A. Yes, sir.
Q. And from there where did you go?
A. To the residence.
Q. And how long did you remain at the residence?
A. I remained until July 14th.
Q. July 14th?
A. Yes, sir.
Q. And at that time did you leave for your home?
A. Yes, sir.
Q. In Alabama?
A. Yes, sir.
Q. Now, while you were here were you at the home of your brother and your-sister-in-law practically all of the time?
A. Yes sir, all except about one day and night that I spent with Mrs. Smith.
Q. That is your niece, Mrs. Smith.
A. Yes, sir.
Q. While you were at your brother's home was Mrs. James living there then?
[fol. 1924] A. Yes, sir.
Q. Was she there practically all of the time?
A. During the first week she was there every night that we were. The second week she was on a dentist convention at Long Beach.
Q. While you were at the home of your brother did you see the gentleman, Mr. Hope, who has testified here?
A. Yes, sir.
Q. And when did you first meet this man, Hope?
A. The first time I met him was on Sunday morning at the breakfast table. I had seen him before that time but that was the first time that I met him or exchanged any words with him.
Q. When was the first time that you had seen this man?
A. The first time I saw him was on about the first part of the week that I arrived which was July 3rd. He came to the residence one evening while my brother and I were in the garage doctoring some chickens.
Q. Do you recall about what time of the evening it was when Mr. Hope came there?
A. No, I can't recall any exact time, but I should judge that it was about 8:30 in the evening, because we had left from the barber shop and had gone home.
Q. It was some time after dinner?

A. No, it wasn't after dinner; it was while my sister-in-law was preparing dinner that we were in the garage doctoring the chickens.

[fol. 1925] Q. And where did you see, and under what circumstances did you see Mr. Hope upon that occasion?

A. He came into the garage while we were—my brother was sitting at the table and I was standing just at his side, holding the chicken, and he entered the garage and he said, "Hello, what about your chickens?" and Mr. James said, "Yes, I have some chickens."

Q. And what if anything did Mr. Hope or Mr. James do then?

A. Mr. Hope stated that he had had difficulty in finding the place—I don't recall just what words were used, other than he said it was an awfully hard place to find and Mr. James said, "Well, you are just about too drunk to know."

Q. What was Mr. Hope's condition at that time with reference to whether he was under the influence of intoxicating liquor?

A. Well, to me he appeared to be drunk.

Q. And what did Mr. Hope and Mr. James then do in your presence?

A. Well, Mr. Hope said that he had difficulty in finding the place, and about that time Mr. James raised to his feet and handed me the chicken that he had in his hand and I left the garage and started to the house.

Q. Did you see whether or not they remained in the garage or where they went, if any place?

A. They remained in the garage probably two or three minutes.

[fol. 1926] Q. And did you observe their movements?

A. Well, I stood at the back door just out—the door that enters the back and Mr. Hope's back was turned towards me, but I could see my brother's feet and Mr. Hope's back and I stood on the step while they stood in the garage.

Q. And did Mr. Hope leave shortly?

A. They both came out of the garage and walked down the driveway towards the street.

Q. And did you keep them under your observation during that time?

A. Well, I stepped off the step and walked to the left of the house, and watched them as they walked down the driveway, after they left beyond the front porch a distance I could not see very well, only the form.

Q. How long was your brother gone on that occasion?

A. Well, it was a very short time. I don't imagine it was over five minutes.

Q. Did your brother return then?

A. Yes, sir.

Q. And did you and he continue with the treatment of the chickens?

A. Yes, I went into the garage and waited for him to return.

Q. Did your brother have any considerable number of chickens on the place?

A. Yes, there were quite a few.

[fol. 1927] Q. How many?

A. Well, I don't really know the number. I would imagine about 50 or 60.

Q. Had you sent your brother some chickens?

A. No, I hadn't sent him any chickens.

Q. Now, upon that occasion, did you observe whether or not Mr. Hope had anything in his hand, any box or gunny sack or any package in his hands?

A. No, he did not carry anything. When he entered the garage, he put his hands into his pockets.

Q. Did Mr. Hope upon that occasion, upon that evening at any time that he was under your observation, did you see him with a box or package or sack or anything in his hand?

A. No.

Q. Now, when your brother returned from the car, did your brother have any box or package or sack or anything in his hands?

A. No, not anything.

Q. Now, while you were there, staying at the place, did you at any time see a box in any way similar to this box which I hold, defendant's C for identification?

A. No.

Q. And did you at any time, while you were visiting at the home of your brother, see any rattlesnakes or reptiles of any kind, any snakes?

A. No.

[fol. 1928] Q. Now, during the course of your visit, did you and your brother and Mrs. James go any place?

A. Yes, we went on the 4th of July, we went to Ocean Park.

Q. And did you go there to some of the side shows?

A. Yes, sir. We went into several of the exhibits.

Q. And did you attend an exhibit of snakes there?

A. Yes, sir.

Q. And who was with you at the time?

A. Mr. and Mrs. James.

Q. And how long were you folks in the snake exhibit?

A. Well, we were there quite a little while. I would imagine about an hour.

Q. Are you able to say whether any of the snake men, I will call them that, whom you have seen upon this trial, in attendance upon this trial were there any at that exhibit?

A. Yes, I recognized the man who talked to us about the snakes the first day I came into the courtroom.

Q. Was that a man by the name of Allman?

A. I don't recall his name, but he was a short, black headed man.

Q. A husky feilow, a husky man?

A. Well, I couldn't say that he was husky and he was not very tall and his complexion was very dark and I noticed him immediately when he left the courtroom.

Q. Now, when did you leave the home of your brother and start to return to Birmingham?

[fol. 1929] A. I left on July 14th.

Q. And did you see your sister just before you left—that is, your sister-in-law?

A. Yes, she came home over the week-end.

Q. And did your brother, Robert, see you off at the train?

A. Yes.

Q. Now, upon one of the Sundays that you were there, did you have occasion to have breakfast with the family?

A. Yes, I had breakfast three Sunday mornings.

Q. And do you recall any occasion upon which Mr. Hope was present at breakfast?

[fol. 1930] A. Yes, Mr. Hope was present at the breakfast table on the second Sunday morning I was there.

Q. Did you folks all have breakfast together?

A. Yes, sir.

Q. Who was present at the table?

A. Mr. and Mrs. James, Lois Wright, and Mr. Hope, and myself.

Q. And upon that occasion were you introduced, or made acquainted with Mr. Hope?

A. Yes, sir.

Q. And what was the manner of the introduction? What was said when he was introduced?

A. Well, Mr. Hope didn't come to the breakfast table just at the time that we did. We were seated at the table when he came in, and Mr. James introduced him as being his friend, Dr. Smith, a former medical student.

Q. And did Mr. Hope make any denial of that, or say anything at that time?

A. No.

Q. What was the condition of your sister-in-law, Mary, at that time, in reference to the state of her health?

A. Well, Mary had found that she was very nauseated, and at times she could not eat.

Q. Was she at that time pregnant?

A. Yes, she was.

Q. And was there any conversation held that morning [fol. 1931] at the breakfast table between you folks with reference to that subject?

Mr. Williams: That is objected to unless Hope was present.

By Mr. Parsons:

Q. In the presence of Mr. Hope at the breakfast table.

A. Yes, there was.

Q. Give us that, please.

A. Well, while we were seated at the table talking, the conversation came up, I don't know just who—but Mary seemed not to be able to eat, and she pushed her plate back saying, "I cannot eat." And so Mr. James said, "Well, honey, you know what is wrong, don't you?"., and she said, "Yes. I just cannot go through with this. I am going to the doctor and have something done."

Q. Did your brother make any reply?

A. He said, "Well, I don't guess you will, and I am not going with you, because we are going to have Bobby, Jr. at the house." She said, "If you don't you will take care of me.", and he said "Chuck" or "Shuck" would take care of her.

Q. Who was it that he called "Chuck" or "Shuck"?

A. Mr. Hope.

Q. The man that is in the courtroom at this time?

A. Yes, sir.

Q. Where was Lois at that time?

A. She had some argument about some food she was [fol. 1932] going to eat, and she left the table, and I cannot tell whether she came back by this time, or not, but she was at the table when we started breakfast.

Q. Now, how long was Mr. Hope at the house while you were there upon this visit in July?

A. Well, I cannot be certain as to the date that Mr. Hope was there, but the night that he stayed was on Thursday, and he had breakfast the first Sunday morning, and then there were several mornings he had breakfast. As well as I remember, it was Monday, Tuesday and Wednesday.

Q. Did you see him again after that until this occurrence?

A. No, I hadn't seen him any more since.

Q. Now, while you were visiting at your brother's home, did you go about the premises, and in the yard?

A. Yes, I used the premises quite a bit, in the back, and around the garage, and in the back yard, and in the chicken house.

Q. Were you helping your brother from time to time look after the chickens?

A. Yes, every night that we were home that we didn't go out, we were at home doctoring the chickens.

Q. Now, your brother, the defendant here, has been a chicken fancier for years, has he not?

A. Yes, sir.

Q. Now, Mrs. Murphy, would you be kind enough to turn and look at this plat, People's Exhibit No. 2, and this pur- [fol. 1933] ports to be a plat of the premises at your brother's home at that time, 1329 North Verdugo Road, and to aid you, the top is north, and the right is east, and the left is west, and the bottom is the south. Now, at the southerly portion of the plat is marked "House" where a figure is drawn, and to the left of that is a figure which is marked "Fish pond". Then these appear to be walkways, and they are marked in gray. To the right or east of the first one is marked "Driveway". To the rear of the house is a table, and then a walkway west of that. Then there appears to be a wider walkway extending almost to the driveway. These marks to the extreme east and west, or right and left of the plat, purport to be the property line. Some distance back from the house is a figure marked "Garage". To the left of that is marked "Gate". Here and there about the fish pond there are some figures done in green

which represent shrubbery for the purpose of this plat. At the fence there is some shrubbery, that is, at the back fence, at the rear of the garage. Then there is a walkway to the place marked "Chicken House", and then another chicken yard, and then to the right is a goat pen, and to the rear is marked "incinerator", to the north. Now, with that in mind, are you now familiar with the plat as being a plat of the premises of your brother's home at that time?

A. Yes, sir.

Q. And did you have occasion to spend some time in the [fol. 1934] back yard, immediately in the rear of the house, or in the vicinity of the fish pond?

A. Yes, I was in the chicken yard, and the garage, almost every day, or in the evening.

Q. And you notice along the driveway, drawn in blue pencil, a mark which extends in a northerly direction up the driveway to a point immediately east of the crosswalk that leads to the rear, or to the north of the house and fish pond, and then the blue mark extends across the walkway to the west. Particularly directing your attention to the area marked with this blue line across the crosswalk, running more east and west, have you been in that vicinity, or were you while you were there in July?

A. Yes, I was all over the back yard.

Q. And have you ever had occasion to stand upon this walkway and observe the vicinity of the fish pond?

A. Well, I couldn't say that I made any particular observation, but as well as I remember——

Q. Could you see the fish pond when you were standing in this position on the crosswalk?

A. Yes, I surely could.

Q. And is it now your recollection that you did see it?

A. Yes, sir.

Q. Were you able to see the curbing, and the walkway to the east of the fish pond, indicating this portion around the circular portion of the fish pond?

[fols. 1935-1940] A. I don't recall making a certain observation, but I am of the opinion that it could be seen.

* * * * * * *

[fol. 1941] Mrs. Pearl Wier, called as a witness in behalf of the Defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Pearl Wier.

Direct examination.

By Mr. Parsons:

Q. Now, Mrs. Wier, we have considerable competition here one way and another, and you must speak up. You talk to this gentleman down at the end of the jury box, so that all the jurors can hear you. What is your name, please?

A. Pearl Wier.

Q. Where do you reside?

A. On 78th Place in Los Angeles.

Q. Do you know Robert S. James, the defendant here?

A. Yes, I do.

Q. How long have you known him approximately?

[fol. 1942] A. About 10 years.

Q. And did you know Mrs. Mary Busch James, the deceased?

A. I did.

Q. Have you ever been to the premises at 1329 Verdugo Road?

A. I have been.

Q. When was the first time that you had occasion to go there?

A. I went there with them the day they leased the place.

Q. You went there with them. By "them," do you mean Mr. and Mrs. James?

A. And Lois.

Q. And Lois Wright?

A. Right. And my husband.

Q. That was the day that they leased the place?

A. It was.

Q. From time to time during the married life of Mr. and Mrs. James did you see them occasionally?

A. I didn't see them again, no.

Q. That was the last time you saw them?

A. Yes, sir.

Q. But you had seen them together, had you?

A. Yes, I had.

Q. What did you observe about these people with reference to whether they treated one another in a kind and affectionate manner?

A. They seemed to care very much for each other, very [fol. 1943] much in love.

Q. Were they affectionate?

A. Yes.

Q. Did you sometime in the month of July, 1935, have a conversation with Mrs. James with reference to the subject of her being in a family way?

A. My conversation——

Mr. Barnes: Just a minute, may we have that answer categorically?

The Court: Yes. Just answer "yes" or "no."

A. No.

By Mr. Parsons:

Q. Yes?

A. No.

Q. Do you know whether she was pregnant?

Mr. Barnes: Objected to as calling for a conclusion of the witness.

The Court: Objection sustained.

By Mr. Parsons:

Q. Did you have a discussion in the summer of 1935 with Mrs. James with reference to whether or not she was pregnant——

Mr. Barnes: Just a minute——

Mr. Parsons: Pardon me; as to whether or not she was pregnant.

Mr. Barnes: That is objected to on the ground it is hearsay.

The Court: You can answer "yes" or "no."

[fol. 1944] A. Yes, I had a conversation.

By Mr. Parsons:

Q. You did?

A. I did.

Q. And did you have a conversation in the summer of 1935 with Mrs. James with reference to the subject of her doing something to terminate her pregnancy?

A. Yes, sir.

Mr. Barnes: That is objected to——
The Court: The answer may stand.

By Mr. Parsons:

Q. Now, Mrs. Wier, did you have an occasion upon the visit which you made to the premises of 1329 Verdugo, with Mr. and Mrs. James to go about the yard to look the place over?

A. I did.

Q. And if you will just turn this way a little, Mrs. Wier, so that I may point out this map to you. This is People's Exhibit 2, and purports to be a plat of the premises at 1329 Verdugo Road. The top is north and the right hand is east and west is the left side and the bottom of the map is south. This first square exhibit here, or marking, illustrates the house. To the left is the fish pond. To the right of the premises is what purports to be a driveway. That extends back to the garage. This object marked here is the garage. Then, there is in gray another walkway extending east and west almost across the property to the rear of the house between the house and the garage.

[fol. 1945] Now, did you have occasion—pardon me; strike that. You will notice going in a northerly direction upon the driveway to the cross walk is a blue line drawn with a blue pencil which turns sharply to the left and goes on the walkway almost to the westerly line of the—following this walkway which runs in an easterly and westerly direction across the premises, the westerly line of the premises. Did you have occasion to go on these premises in the vicinity of this walkway that runs easterly and westerly across the lot?

A. I did.

Q. And did you have an occasion—and when was that?

A. We were living over there——

Q. When was that?

A. I think that was two weeks after Easter of 1935.

Q. And upon that occasion, did you stand in the vicinity of the walk upon which this blue line is drawn?

A. I did. By the table there.

Q. On the back of this table?

A. Yes, sir.

Q. Meaning this table between the walkway and the house?

A. Yes, sir.

Q. Did you have occasion to look in the direction of the fish pond?

A. I went all around it.

Q. From the position you stood in on the walkway, which [fol. 1946] runs in an easterly and westerly direction, were you able and did you see the fish pond?

A. I did.

Q. Did you see the walkway around the fish pond, particularly to the east of the fish pond?

A. I did, and made remarks about it.

Mr. Parsons: Cross examine.

By Mr. Williams:

Q. What did you say your address was.

A. 1862 78th Place.

Q. What is your husband's name?

A. J. C. Wier.

Q. The only time that you were at the premises that you have been talking about was either late in April or early in May of 1935?

A. Yes.

Q. You were there for how long?

A. We were there practically the entire afternoon.

Q. And you have never been there since?

A. No, I have not.

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[fol. 1947] CHARLES MARTIN, called as a witness in behalf of the Defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Charles Martin.

Direct examination.

By Mr. Parsons:

Q. Mr. Martin, what is your business or occupation?

A. Barber.

Q. Barber?

A. Yes, sir.

Q. Where are you now employed?

A. 522 West 8th Street.

Q. And Mr. Martin, will you keep your voice up so that those folks at the end of the jury box can hear you?

A. Yes, sir.

Q. How long have you been employed at that establishment?

A. Two years last February.

Q. And do you know the defendant who sits here, Mr. Robert S. James?

A. I have known him since I started working for him two years ago last February.

Q. You started working for him two years ago last February?

A. Yes.

Q. And during the year 1935, were you employed by the [fol. 1948] defendant?

A. Yes, sir.

Q. Directing your attention to August 5th, 1935, do you recall having seen Mr. James on that day?

A. Yes, sir.

Q. And shortly after that day was your attention particularly directed to that day by the happening of some event?

A. He came in Sunday morning and I said, "Good morning"——

Q. Perhaps you didn't understand me. Did you learn of the death of Mrs. James on or about August 5th, 1935?

A. That was Monday?

Q. Yes.

A. Now, Mrs. Lueck telephoned to me Tuesday morning.

Q. Tuesday morning you heard of her death from Mrs. Lueck, is that right?

A. Yes.

Q. And now directing your attention to Monday, August 5th, did you see Mr. James upon the morning of that day?

A. On August 5th?

A. Yes, sir.

A. Yes.

Q. And about what hour of the day did you first see Mr. James?

A. About 15 minutes to 9:00.

Q. And how close were you to Mr. James that morning?

A. Well, he passed by me almost—I should say he passed [fol. 1949] by me within two or three inches.

Q. Did he speak to you?

A. Yes, sir.

Q. Did he say "Good morning" to you?

A. He said, "Good morning."

Q. Did you smell the odor of alcohol on his breath and about his person.

A. No, sir.

Q. Did you observe whether or not he was intoxicated?

A. He was not intoxicated that I could see.

Q. Was there anything about his conduct or actions or appearance that morning that was different from anyone of the many mornings that you saw him upon his arrival at work?

A. I couldn't see anything.

Q. During the course of the day did Mr. James leave the establishment at all?

A. He left about 1 o'clock for lunch and he was out about 20 to 25 minutes.

Q. Do you recall whether or not throughout the day he was working upon the trade, his customers?

A. Yes, in the regular routine of everyday work. I remember some of the customers he worked on some of them that were waiting for him when he was out to lunch.

Q. Do you recall any particular person who was waiting for him when he was out to lunch?

A. Yes, sir, Mrs. Osborne with her three little daughters.

[fol. 1950] Q. Did he take care of the children's needs?

A. One of them.

Q. After he retuned?

A. Yes, sir, he took care of one of them.

Q. Was that the occasion of your particularly noticing how long Mr. James was out for lunch?

A. It certainly wasn't over 25 minutes or thereabouts.

Q. These folks were waiting for him to return, were they?

A. They were awaiting his return, because he usually did the work of one of the girls.

Q. Were they waiting for Mr. James to return from lunch that he might serve them?

A. Yes, sir.

Q. Now, on the previous Saturday, August 3rd, did you see Mr. James upon that day?

A. Saturday?

Q. Saturday evening, did you see Mr. James?

A. Oh, yes.

Q. And do you know how late Mr. James worked that day?

A. Why, he must have left the place around 8:00, between 7:30 and 8:00 o'clock.

Q. Between 7:30 and 8:00. That was his usual time of leaving was it?

A. That was the usual time, yes.

Q. Was that the time upon this particular occasion?

A. Yes.

[fol. 1951] Q. Now, what time did he close the shop as to receiving patrons?

A. Well, we closed up at 7:00. We went home at 7:00 if there was nothing doing, but we never turned any of our friends down. We usually worked until we got through.

Q. Did you on that Saturday night?

A. Well, we usually worked a little after 7:00.

Q. What would Mr. James do after you locked up at 7:00 o'clock on Saturday night?

A. Well, he usually paid his help off.

Q. Would he count the money and check on it?

A. He would count the money and he usually left some change there for Monday morning because he arrived usually at 9 o'clock and we opened up at 8:00.

Q. Did you know Mrs. James, now deceased, Mary Busch James?

A. Yes.

Q. And she worked there in the shop, did she not?

A. Yes.

Q. And how long did you know her?

A. Well, since she started working there, from March sometime until her death.

Q. And did you have occasion to observe how Mr. James and Mrs. James acted toward one another and treated one another with reference to whether or not they were kind and affectionate and loving toward one another?

A. They were very affectionate so far as I could see.

[fols. 1952-2033] Q. Did Mr. James treat her apparently in a kind and considerate manner there in the shop?

A. Yes, sir.

Q. And do you recall an incident in July, 1935, of her having been away for a few days, and her return?

A. She was on her vacation at Long Beach, at least that is what I heard she was, and she came back about five days later, and they embraced each other in the barber shop.

Q. In the shop?

A. Yes, sir.

Q. And did they appear to be very happy at seeing one another?

A. Yes, sir.

Q. Were they affectionate toward one another?

A. Yes, sir.

Mr. Parsons: That is all.

Mr. Williams: I have no questions.

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[fol. 2034] ROBERT S. JAMES, the defendant, recalled as a witness in his own behalf, having been previously sworn, testified as follows:

The Court: Let me have your full name again, please.

A. Robert S. James.

Direct examination.

By Mr. Parsons:

Q. You are the defendant in this matter, are you, Mr. James?

A. That is right.

Q. And Mr. James, did you ever have a conversation with Mr. Hope at the barber shop, in the City of Los Angeles, your barber shop, wherein in substance or effect you told him that you had a friend who wished to get rid of his wife, or some person, and that you would pay him if he would go out and purchase a rattlesnake, or rattlesnakes?

A. I never did.

Q. Now, Mr. James, did you ever, at any time, in substance or effect tell Mr. Hope that you wanted him to purchase a rattlesnake or rattlesnakes, for you or any other person?

A. I did not.

Q. Did you ever at any time tell Mr. Hope that you wanted him to purchase for you or any other person a box?

A. I did not.

Q. How long have you known Mr. Hope?

[fol. 2035] A. I have known him about seven or eight years.

Q. And did you ever tell Mr. Hope, in substance or effect, that you were a killer, and that you wanted to kill your wife, Mary?

A. I never thought of such a thing.

Q. Did you ever tell Mr. Hope that?

A. No.

Q. Did you ever tell Mr. Hope that you had some life insurance in your favor upon Mary's life, and that if he would aid you in killing her that you would pay him a portion of the insurance?

A. I did not.

Q. Now, Mr. James, did you, upon one occasion, receive or permit Mr. Hope to remain at your home?

A. Yes, I permitted him to remain at my home three or four days.

Q. When was that?

A. Well, he came to my home, I think it was the 6th of July, and stayed three or four days.

Q. Of last year?

A. Yes.

Q. And did you have any conversation with Mr. Hope with reference to the circumstances under which he wished to come to your home?

A. Yes.

Q. What did he say to you?

[fol. 2036] A. Well, he came to my house the 3rd of July about 8:00 o'clock at night, and he wanted to spend the night. He was drinking, and I wouldn't let him spend the night. I told him my sister was there, and that she wouldn't like it. He asked me to loan him a dollar so he could have a place to sleep.

Q. Now, where was it that you talked to Mr. Hope upon that occasion, on the 3rd of July?

A. Well, I was in my garage when he first came in. I was treating some chickens I had for a cold, and my sister was helping me. He came to the garage and spoke to me. He said, "This is Dr. James, I see." I told him it was, that I was doctoring some chickens. So he talked to me a little bit. I don't remember everything he said, and pretty soon he called me outside, and said he wanted to speak to me, as though he didn't want my sister to hear what he had to say to me, and he told me he had had a fight with his girl, and that she had run him away from home, and that he didn't have any money, and he wanted to stay that night.

He was pretty intoxicated. That is when I told him he couldn't stay. There was more conversation. Do you want that?

Q. Yes, please.

A. I walked out of the garage, and I walked down the driveway with him, and I told him he couldn't stay all night. He asked me to loan him a dollar. I asked him why he didn't go to work and get him a job. He said he was doing [fol. 2037] experimenting now in chemistry, and pretty soon he would be able to have him a job, but he wanted to stay with me until he was able to get on his feet. I said, "If you will come back to my house sober, and promise not to drink while you are here, I will let you stay, because I have a spare room here that I don't need." He said, "I will be back tomorrow night sober," and I gave him the dollar, and started to leave, and he began to tell me about his experimenting in the laboratory work. He had a little tin box with some yellow stuff in it. He called it rattlesnake venom. I don't know what it was. I had never seen any of it before. He told me about his experiments. He wanted to experiment with a chicken I had. He said, "I would like for you to cut one of them on the leg, and rub it on there, and see what it will do." I thought he was intoxicated, and I told him "No," and I took him to his car, and he got in his car and left.

Q. When next did you see him after that?

A. I saw him next Saturday, the 6th.

Q. And where was it you saw him on the 6th?

A. He came to the barber shop.

Q. At about what time of the day?

A. Well, I don't remember. I was pretty busy when he came in there. It was some time in the afternoon.

Q. Did you see him later that night?

A. He came to the barber shop and told me he wanted to [fol. 2038] come up and stay a while, and I gave him a key to the house. I told him I didn't know what time we would be home, and I gave him the key, and he came sometime that night; I don't know what time he came in.

Q. In any event, was he there when the family arose, when you arose on the following Sunday morning?

A. He was there Sunday morning, and had breakfast with us.

Q. And who was present at the breakfast table?

A. My wife, my sister and Lois Wright, my niece.

Q. Was Mr. Hope there?

A. Yes.

Q. And at that time was there any conversation at the breakfast table among you folks?

A. Yes, there was quite a little conversation.

Q. In what manner did you introduce Mr. Hope to any of the folks there, if you did?

A. Well, I went to his room, and I brought him in to breakfast, and I introduced him to my wife and my sister, and I don't know whether Lois met him, or not. That is the way I introduced him.

Q. And how did you introduce him?

A. I introduced him as Dr. Smith.

Q. Had you had any conversation with Mr. Hope with reference to that matter?

A. He wanted me to introduce him that way, that he was [fol. 2039] having trouble with his wife, his former wife, and he didn't want her to know his whereabouts.

Q. And at that time what was the condition of your wife, Mary, with reference to the state of her health?

A. Well, the whole thing that was wrong with her health was that she was pregnant, and she began to be very nauseated from it.

Q. And she had been sick for a few days?

A. Yes, she had been nauseated for several days.

Q. And was there any conversation at the breakfast table with reference to her nausea, and her condition?

A. There was.

Q. What was that conversation?

A. Well, she was not able to eat any breakfast, and I began to tease her about not being able to eat, and she pushed her plate back.

Q. Keep your voice up, please.

A. I told her, "You know why you cannot eat, don't you?" and she said, "Yes, but," she said, "I am not going to go through with it, because it is terrible. I want you to take me to a Doctor." And I said, "I am not going to take you to any doctor. We are going to have a little baby."

Q. Just continue, please.

A. I don't know just what all was said about it, but I was more or less kidding her, and finally she said, "Dr. Hope will take care of me. I will get you to help me," [fol. 2040] and he said, "You bet I will."

Q. Now, were you pleased and happy when you learned that your wife was in this condition, in a family way?

A. Yes, I was pleased about it.

Q. And how did Mrs. James feel about it?

A. Well, she was very pleased about it at the time. The conversation at the breakfast table was more or less kidding.

Q. And subsequently, or rather after that conversation on that Sunday morning, how long was Mr. Hope a guest at your home?

A. He stayed there, I think, until Wednesday.

Q. And when did you see him again after that?

A. Well, he left there Wednesday, and I didn't see him again until—I don't recall seeing him any more until the 3rd of July.

Q. August, you mean?

A. The 3rd of August, yes.

Q. Now, upon the 3rd of August did you meet Mr. Hope at about 5:30 or 6:00 o'clock in the evening, and take delivery from him of a rattlesnake?

A. No.

Q. Now, did Mr. Hope, at any time, ever deliver to you, or leave at your premises, with your permission, a rattlesnake?

A. He never did.

Q. Did he ever give you one downtown any place?

A. He never did.

[fol. 2041] Q. Now, did you ever meet Mr. Hope on Sunday, August 4th, and take Mr. Hope in your house, and there put your wife's foot in a box with a snake?

A. I did not.

Q. Did you ever contemplate, or think of such a thing?

A. I never thought of such a thing, and I never heard of such a thing.

Q. Now, did you ever let Mr. Hope have your automobile from time to time?

A. Many a time I have let him have my automobile.

Q. Just a loan, you loaned him the car?

A. That is right.

Q. And have you from time to time given him small sums of money, or loaned him money?

A. Yes, ever since I have known him I loaned him money, gave him money in the barber shop, and helped him out.

Q. And that extended over a period of years?

A. Right up until now.

Q. Now, did you ever, with Mr. Hope, alone or otherwise, do anything to your wife, Mary, to bring about her death?

A. I never did.

Q. Now, did you ever take your wife, Mary, with Mr. Hope, or some other person, or at all, and carry her, drag her out of the house, and throw her in the fish pond?

A. No.

Q. Did you ever think of such a thing?

[fol. 2042] A. No, I never thought of such a thing.

Q. Now you had rented this house out on Verdugo Road, and had lived there some little time before your wife passed away, had you not?

A. Yes, sir, that is right.

Q. And had you spent considerable time upon the premises of your property there?

A. Well, I was there every day.

Q. And were you raising chickens there?

A. Yes, I had 50 or 60 game chickens, and three or four bulldogs.

Q. Now, Mr. James, directing your attention to the plat here upon the board, and I will indicate the map to you, Plat No. 1, People's No. 1, to the right-hand is east, and to the left is west, and the top is north, and the bottom is the south. This represents, apparently, a diagram of your home, indicating at the bottom of the map the porch, living room, dining room, bedroom, hallway, and then the kitchen to the extreme east of the house, and then the extreme northeast corner is a porch, and to the left is the bathroom, and in the northwest corner is another bedroom. Then to the west of the house there is marked on the map a semicircular figure to represent the fish pond. Around that circular figure a line in black ink representing a walkway. To the extreme right, and in black lines, is what is marked there as the driveway. And then across the rear part of the house [fol. 2043] is a mark in gray, between two black lines, indicating a walkway. To the north of the house is the cement table.

Now, directing your attention to another plat, Plat No. 2, People's Exhibit No. 2, the top is north, and the right is east, and the left is west, and the bottom is south. In gray here is indicated a driveway to the east, or righthand side of the plat. And to the extreme south is marked "House", and to the left is the fish pond, and in gray around that is

an area between two black lines, indicating a walkway. The walkway extends to the rear of the house, apparently. At the back of the house is a table. The walkway, the east and west walkway, extends to a larger walkway, done in gray, about an inch wide, which apparently extends clear across the premises. These lines on the east and west in black are apparently the lines of the property. Then the garage is here, and the gate here, and a walkway leading to the back. A chicken yard, and chicken house, another chicken yard and shed, and to the extreme north is the incinerator, and to the right is a tent. Now, down on People's Exhibit 2 there are various areas indicating shrubbery of one sort and another.

Now, have you spent, and did you spend, prior to August 5th, considerable time in that back yard?

A. I watered that shrubbery every morning.

Q. And did you look after your chickens there?

A. I did.

[fol. 2044] Q. How much poultry did you have?

A. I had 50 or 60 chickens.

Q. And you cared for them yourself, didn't you?

A. Well, while my wife was working I took care of them, but when she was home she took care of the chickens mostly herself.

Q. Now, directing your attention to a blue mark which runs by the driveway to the east of the house, and this other shrubbery to the left on the plat, and to the west, following the walkway to the rear of the fish pond, were you familiar with this area on the walkway, which extends in an easterly and westerly direction across the property to the north of the fish pond?

A. Very familiar with it.

Q. And from a position at about the center of the plat, where the walkways meet, the east and west walkway meets the walkway that extends to the north, were you able to see clearly the fish pond and the surroundings?

[fol. 2045] A. You couldn't help but see the fish pond if you looked that way.

Q. And I show you a photograph and ask you to examine that please and I will ask you if that is a fair representation of the view of the fish pond from the position on the walkway, east and west walkway.

A. Very good.

Mr. Parsons: I will offer this in evidence as People's Exhibit next in order.

Mr. Williams: We have no objection, but may I ask whether counsel will inform us when those pictures were taken?

Mr. Parsons: Recently.

Mr. Williams: Since Mrs. Henry took the stand?

Mr. Parsons: Yes.

The Court: Mark it H in evidence.

Mr. Parsons: Is that a fair representation of the condition as it appeared in the vicinity of the fish pond from the east and west walkway, about the 5th of August, 1935?

A. I would say that it was.

Q. And I show you another photograph. Will you examine that, please? I will ask you if that appears to be a fair representation of the view of the fish pond from a position on the east and west walkway?

A. Yes, it is.

Q. And is that a fair representation of the manner in which the area appeared on or about August 5th, 1935?

[fol. 2046] A. Yes, it is.

Mr. Parsons: I will offer that in evidence.

The Court: Mark it I in evidence.

By Mr. Parsons:

Q. I will show you another photograph, Mr. James and ask you if that is a fair representation of the view of the fish pond and the area surrounding it from another position nearby on the east and west walkway?

A. It is.

Q. And is that a fair representation of the conditions as they appeared there on or about August 5th, 1935?

A. I think so.

Mr. Parsons: I will offer this in evidence as Defendant's next in number.

The Court: Mark it J in evidence.

Mr. Parsons: May I pass these to the jury at this moment for observation?

The Court: Yes, you may.

Mr. Parsons: Possibly this might be a good time for them to examine them.

The Court: Very well.

A Juror: May I get my glasses?

The Court: Yes, certainly.

Mr. Parsons: Perhaps we had better wait until the jury has examined the photographs.

The Court: Yes.

(Photographs examined by the jury.)

[fol. 2047] By Mr. Parsons:

Q. Now, Mr. James, did you ever at any time pay Mr. Hope any money for the purpose of aiding or assisting you or any person in any way to kill your wife, Mary?

A. I did not.

Q. Now, how long had you known Mary at the time of her death, approximately?

A. I met her about the 1st of March of that year.

Q. And did she work for you?

A. Yes, she applied to my beauty shop for a position.

Q. And you were then operating a barber shop and beauty shop here in Los Angeles?

A. Well, I was operating a barber shop and I had a beauty shop in the rear unfurnished, and the people were moving out with their beauty shop and I was going to install my beauty shop, and that is why I was in need of a beauty operator and I installed the beauty shop and she had the job.

Q. And during the time that you operated this establishment, and before the death of your wife, Mary, was she almost continuously at your place of business in charge of the beauty shop, part of your business?

A. She worked there up until the time that she went to Long Beach to the convention.

Q. And that, however, was but a few days visit, is that right?

A. She was there about a week.

Q. Now, was your wife a good helpmate? Did she aid [fol. 2048] in operating your business?

A. She helped me in most every way.

Q. Was she kind and good to you?

A. We never had a cross word.

Q. And did she appear to think a great deal of you?

A. She did.

Q. And did you think considerable of her?

A. I did.

Q. And were you people happy out there on Verdugo Road?

A. We were just as happy as we could be.

Q. And this little place that you had rented out there in the hills, was she with you when you rented it?

A. Yes.

Q. And was she happy there?

A. Yes, she seemed to be.

Q. How is that?

A. Yes, she seemed to be.

Q. And Mr. James, did you, ever at any time aid Mary, or suggest to her, that she take out any life insurance with a view of your own in some manner to kill her in order that you might be able to collect the insurance?

A. I have aided her in taking out insurance, but not with that in mind.

Q. Did you ever at any time consider killing your wife, Mary?

A. No.

[fol. 2049] Q. Did you have any desire to?

A. No.

Q. Now, what was your financial condition in 1935, the summer of 1935? Did you own this business?

A. Yes, I owned my business and I had some money to put in my beauty shop. I didn't owe anybody anything. I had a little money in the bank, I don't know, $400.00 or $500.00.

Q. Was your establishment clear of indebtedness?

A. It was. I did not owe anybody a nickel.

Q. And were you and Mary making this sum of money that enabled you to live in the manner you wanted to?

A. We had plenty to be comfortable on.

Q. Did you have any pressing debts or obligations at that time of any kind?

A. I didn't have any debts. And I had a new car and it was paid for and my business, and it was paid for, and I didn't owe aaybody anything.

Mr. Parsons: May we take the noon recess at this time?

The Court: We will take our recess at this time. Just one minute, ladies and gentlemen of the jury. My attention has been called to the fact that there appears in the last

issue of Liberty Magazine some reference to this case. You are particularly cautioned not to read any portion of that until the case is finally submitted to you.

Mr. Parsons: If I may state, your Honor, your Honor has repeatedly instructed the jury but for the last three days I [fol. 2050] have paid particular attention to the radio broadcasts and they have almost reenactments of some of the things that have taken place in the courtroom with considerable comment thereupon which I think that no one connected with this case should listen to.

The Court: Thank you, Mr. Parsons, I think we are very desirous and everyone throughout the course of this trial to be fair to the carrying on of this trial and I say this in fairness to counsel and I think it is a compliment to counsel and to carry out that idea I am going to ask the jury to cooperate. Refrain from any possibility of getting any idea or suggestion from anything on the outside and if you should be present when anything is told over the radio or spoken words of any kind, do all in your power to avoid hearing or seeing that, because we are going to do all we can to have a decision made in this case solely on the evidence and the law as given you here in court. I am merely cautioning you out of the super abundance of caution. I should regret that even the slightest criticism could be made to the conduct of this trial. You may be excused until 2 o'clock, and the audience will remain seated until the jury has retired.

* * * * * * *

[fol. 2051] Robert S. James, resumed the stand and testified as follows:

Mr. Parsons: What was the last question and answer?

(Record read by the reporter.)

By Mr. Parsons:

Q. Another subject, Mr. James, for a moment, referring to the fish pond at the west of the house, and the area of the walkway, now do you recall in August 1935 of any position along the walkway that extends in an easterly and westerly direction, from which one may see the east side of the fish pond?

A. I would say that there wasn't any place on the walk that couldn't see both sides of the fish pond.

Q. I see.

A. Very clearly.

Q. Now, Mr. James, did you ever have any conversation with your nephew with reference to the change of beneficiary on the life insurance from yourself to your sister or any other person?

Mr. Williams: That is objected to, if your Honor please, as not being relevant to any issue involved in the case.

The Court: May I have the question again?

[fol. 2052] (Question read by the reporter.)

The Court: Objection sustained.

By Mr. Parsons:

Q. Now, Mr. James, with reference to your trip to Colorado, you and your wife Winona made a trip to Colorado, did you not?

A. We did.

Q. And at that time what was your destination, at the time that you left Los Angeles?

A. We were on a trip to Birmingham, Alabama, to see my people.

Q. When you left Los Angeles did you have in mind stopping en route some place to Birmingham?

A. Yes, we had some business in Colorado Springs to take care of. We were going to rent a farm there that belonged to my wife's mother, to a gentleman who wanted to rent it for the next year. That was our business in stopping there.

Q. Did you go to Colorado Springs?

A. We did.

Q. And by what means did you go to Colorado Springs?

A. We went there by automobile.

Q. What car was it, whose car was it?

A. My car, a Studebaker coupe.

Q. And did you make a trip while you were at Colorado Springs to Pike's Peak on a sightseeing tour?

A. We did.

Q. How long were you at the top of Pike's Peak?

[fol. 2053] A. Well, we left Colorado Springs about noon. I don't know how long it took to drive up there. It may have been an hour or so. We stayed up there until about 5 o'clock that evening.

Q. And how long were you coming down the mountain side before something unusual happened?

A. Well, I don't know how long. We had only driven about three miles, and of course, you drive in second gear down there, very slowly.

Q. And now, I will direct your attention to an exhibit here, People's Exhibit No. 39. Will you examine that, please? That is a drawing made by Mr. Rogers, the gentleman from Colorado. Does that appear to be a somewhat fair representation of that switch-back or curved highway coming down off the mountain?

A. The switch-back is all right, but the car didn't go over where he says it did.

Q. Will you take this pointer, please, and step over here and point to where the car went off the road?

A. The car went off the road right here. It didn't make any bend at all.

Q. Just a minute, I will get a piece of chalk and mark that if I may. Now, will you just tell these folks where the car went off the road?

A. The car as we were coming on this straight-of-way here, the tracks showed that night and the car went right [fol. 2054] straight over here, didn't make any bend over here at all, but it did stop about where the man says it did.

Q. Now, will you draw a line illustrating where the car went off the road?

A. I will say it went off the road right here.

Q. Now, I will mark the start of that "J-1" and the end of that mark "J-2". Just take your seat now, Mr. James. And because I am near you, do not let your voice drop, please. Now, about how far did the car travel, did you observe, after you saw the car had come to rest? About how far did it travel from the highway?

A. I estimated it at between 150 and 200 feet.

Q. And was that your best judgment from what you saw?

A. Yes, it was my best judgment.

Q. And as you left the automobile after the accident, describe what you did.

A. Well, when we went over the embankment there, my wife was driving the car and I was looking through some field glasses through the window, and I did not know that the car was going over the bank until I felt it take its lunge. Of course, I hardly knew, rolling through the air, what was going on. I didn't know really when the car was stopped

because I was knocked unconscious some way or another, but when I came to, I was about 25 feet to the right of that car and my wife was just barely in the car and barely out. The disc wheels on this car,—and you know what disc [fol. 2055] wheels are—in rolling over the mountain had flattened out. They were flat as a pancake and the car was sitting right on the ground. In fact, there was a lot of loose rocks piled up around the running board and her head was laying in those rocks. And the door on my side had been broke open and couldn't be closed and it was daylight when we went over the mountain and it was dead black when I came to. So I got up and went to the car and I found my hip and back was badly hurt.

I picked her up in my arms and saw her head bleeding. I only had matches. The lights on the car were broken and I had a flashlight and I couldn't find it, as I struck a match and asked her how bad she was hurt and she said, "Get a doctor."

That is all she would ever say to me as she just kept groaning. Well, it was very cold up there, in fact, it was snowing a little bit and I was nearly frozen to death when I woke up. I tried to pick her up and put her in the car and my wife weighed 150 pounds and she was pretty heavy and my back being hurt, I couldn't get her in the car. She was sitting down on the floor. I tried to get her in the seat and when I finally decided I couldn't get her in the car, I drug her out on the ground and I took some blankets out of the car and put one under her and one over her. I didn't know what to do about leaving her. I was afraid to leave her. I could hear an animal howling like I never heard before. I was afraid it was a mountain lion. I was afraid [fol. 2056] she would not be there if I left her there. I thought maybe I would shoot something along the road. I thought I would get that pistol and shoot and that somebody might hear. I couldn't find that. So, there was nothing to do. I knew she would die if I didn't get out of there, the way she was bleeding, and I was confused. I didn't know which way I had got in there. I couldn't see down in this pit which way to go, so I climbed back to the road and I happened to go back the way the car came down and when I reached the road I knew that we hadn't come very far from the top, so I started back towards the top, I mean towards the top of the mountain, and I must have walked a quarter of a mile. Of course, the mountain was

steep and my right leg was nearly paralyzed and I decided I would never be able to make it to the top of the mountain, so I turned back and went down toward Glen Cove. It was much further that way, but the walking was much easier. It must have been four or five miles. That is where I met the road camp men and they called an ambulance and took two trucks and seven or eight men and we started back. They asked me where we went off and I told them I didn't know where the car went off, but I would probably know when I got there, and we drove back up the road until we saw the tracks where the car went over and we stopped the truck and about seven of the men went down with a stretcher to get my wife, and one kept me up there, stayed with me. He said, "You aren't in any shape to try to go down there". That is where I particularly noticed the [fol. 2057] tracks on the road and they said the car hadn't even made a turn there. That is why I am so sure about the fact of the car leaving the road.

[fol. 2058] Q. Now, after she had been picked up and taken by ambulance, where was she taken to: Colorado Springs, to the hospital?

A. She was taken to the Bethel Hospital, in Colorado Springs.

Q. And did you go there as well?

A. They took me there and put me to bed that night. They told me that I had been so exposed that I was liable to have pneumonia, and they examined me and found that I was only bruised. I had no broken bones. The next morning at 7:00 o'clock my wife was in the room next to me, and I could hear her groaning all night. Of course, I didn't sleep any, but the next morning at 7:00 o'clock I heard her call for me, and I began to dress, and I was practically dressed when the nurse came to the room to get me, and I went into the room where she was, and she asked me what had happened, and I asked her if she didn't remember going over the mountain.

Mr. Williams: Just a minute. We object to any conversation.

Mr. Parsons: Just go ahead, without telling any conversation, and tell what you did. How long was she in the hospital, Mr. James?

A. I don't remember the days that she was in there. She was there until the doctor told me they had done all they

could for her, and it was perfectly all right to take her out [fol. 2059] to a cottage, or to a hotel, or some home.

Q. And did you then do that?

A. I did.

Q. And while she was in the hospital were your expenses some considerable item?

A. Yes, my expenses were $7.00 a day for a room. Of course, I didn't know what the doctors would charge. I had three specialists with her, and I had two special nurses which were charging me $6.00 a day. I only had $150.00 in money when I left here, and when we had the wreck my purse was lost out of my pocket, and I was penniless. I didn't have a penny. The first thing the hospital wanted to know next morning was could I pay the bill. I told them that I didn't have any money with me, that I had lost my money, and that I was going out as quick as I was able to and see if it could be found, but that I did have a business in California, and that I would pay the bill, and that I had insurance that I could borrow money on, and I would assure them that I would pay the bill before I left there.

Q. Now, did you let one of the nurses go for a time, and did you remain with your wife a portion of the time at night?

A. Yes. I wired my father-in-law in North Dakota about the accident, and I wired her mother here, and sister, about the accident, and her father came to Colorado, and when he came he asked me my financial circumstances, and [fol. 2060] I told him just what had happened, and he loaned me $100.00, and I told him about the nurses. He said it wasn't necessary for us both to be there at the hospital in the day, and we agreed to discharge the two special nurses that we had, and he was to stay at the hospital during the day. I stayed at the hotel during the day, and slept, and I stayed up with my wife during the night, because I was afraid she might get out of bed, or something, because she had always been a terrible sleep-walker, and I stayed awake every minute of the night to see that she couldn't get out of bed, and we saved $12.00 a day by discharging the special nurses.

Q. How long, approximately, was she in the hospital in Colorado Springs?

A. I don't know whether it was three or four weeks.

Q. And did you then take her to this little place at Manitou?

A. Yes, I wanted to take her to Mrs. Yarnell's house; that was a cousin of hers, and she didn't want to go there. She wanted me to get a cottage where she could be alone. She didn't like the hospital, and she didn't want to be there, so I went to Manitou, where she suggested me going, and rented a cottage, and I bought wood and coal, turned on the lights and gas, and prepared it for her, and took an ambulance and took her over there.

Q. Now, what were the circumstances under which you later found her one afternoon, one evening?

[fol. 2061] A. While I was there of course I took care of her the same as a nurse. I was up with her practically day and night. I just took a nap when I could. I had to bathe her. She was not allowed out of bed, and I prepared her meals, and I had to go to the grocery store, which was about a mile down the hill. I don't know the name of the little place down there, the Post Office; but I went down there every evening to buy the groceries for the next day, and she was doing a lot of letter writing, and I always went at 5:00 o'clock, and waited until the 5:00 o'clock mail was put up, and I would take the mail back to the house. The day of her death—a couple of days prior to that the doctor had visited my home, and he told me the hospital was very cross because I had not paid anything on her bill. Well, I had put in for a loan on an insurance policy on which I could borrow $250.00. I put that in the next day after the accident, and I had not received it at that time. I told him I would go down the next day and see the insurance company and see why I hadn't got the money.

So the next day, after I had given her her lunch, and fixed her bed for the evening, changed the linen, and so forth, I don't know whether it was 1:00, or 1:30, but I walked down to this little place and I got a bus and I went in to Colorado Springs, and I visited the hospital and told them that I had been to the insurance company, and the check hadn't arrived, and they said they would find out what [fol. 2062] had happened to it, and I tried to satisfy the hospital that I would pay them soon. The ambulance company was bothering me for their money. They charged me $35.00. I told them I would pay them as soon as I got the check.

I went over to the hotel where I stayed, where I was receiving my mail, and I didn't have any mail. I spent considerable time there. At the time I got ready to go back to

the town, after visiting all these places, I mean back home, it was about 4:30 when I got to the end of the business lane of this little town, where I received the mail. There I got my groceries, and the grocery boy was going my way, and I had gone up with him several times before, and he suggested that I ride with him, or maybe I told him that I would like to ride with him, and I rode with him, and when I got to the house I could see that my wife was out of bed, something that she had never done before, and she was not allowed to, unless I was with her with my arms around her, because the doctor gave me that permission. I looked into the bathroom, and I found my wife across the bath tub.

Q. Now, Mr. James, while you were upon the mountainside, did you take a hammer and beat your wife about the head?

A. No, I did not.

Q. Did you have any intention, or any thought or desire to do such a thing?

A. I never thought of such a thing.

Q. Had you had the hammer out at all that day?

[fol. 2063] A. Well, the night we went into Colorado Springs I was driving pretty fast, and I had a puncture, and the rim seemed to be fastened by the lock, and it was necessary to hit it with the hammer to loosen the lock. Most anybody has had that experience in taking locks off. I keep tools in my car at all times. Being tired, and late at night, I might have left the hammer on the floor board, and it might have been there the next day.

Q. Now, after this accident did you dispose of your automobile there on the scene? Did you sell it?

A. Yes, it was so badly smashed that I sold it right where it was, for $25.00.

Q. Now, directing your attention to this road that comes down off the mountain top, just briefly describe to the jury here what that road was made of? What was the surface of it?

A. Well, to my best knowledge it was a kind of dirt and gravel road. It was very narrow, and it was very scary looking.

Q. What was the condition with reference to there being any signs along the side of the road to place a car in immediate notice of a drop forward from the top of the mountain?

A. There were signs all along the top of the mountain

road, warning you to drive in second gear or you would burn your brakes out.

[fol. 2064] Q. Now, after this occurrence, after your wife had passed away there, did you return with her body to Los Angeles?

A. Yes, I brought her back here, and buried her at Forrest Lawn.

Q. Now, from time to time, in the last few years, have you given to your relatives in Alabama any money?

A. At the time of that accident——

Mr. Williams: Just a moment. I want to object to that, unless it be limited to a time after the death of Winona.

A. That is what I am going to tell.

Mr. Parsons: I think that is the question. I will make it a little more definite:

Q. After the passing away of Winona, did you from time to time give any of the members of your family, any of your relatives in Alabama, sums of money? If so, who were the persons, and approximately how much did you give them?

A. Well, I was mentally sick from that accident. I wasn't able to work, and I went to my sister's home, and I stayed there practically a year, in Birmingham, before I was able to go back to work. I accepted an insurance check that my wife had, for $10,000.00. I gave my sister that check to deposit in the bank. She gave me about $3,000.00 out of it, and she kept the rest of it, and spent it during the rest of the year. She had about three living with her, of my folks, they were out of work, and had no means of getting [fol. 2065] any work, and I felt sorry for her. She had always taken care of my mother, and I contributed to my sister, Mrs. Wright, who had four small children. When my mother died she left a lot of expenses on my sister, and she was in debt and owed $3,000.00. I told her she could have the check, and as the year rolled on that check was distributed between she and Mrs. Wright, and my brother, and about all I used, whatever it was, was probably for my support.

When I left there about a year later to go back to California to go to work, I had to borrow $100.00 off my brother to make the trip on.

Q. Now, after you returned to California, did you eventually set up a business here?

A. Yes, when I came back here I opened a barber shop, and I had just about money enough to make a down payment on it.

Q. And after you had returned from Alabama and opened up your business here in Los Angeles, you remained here practically all of the time, did you?

A. I have remained here since April, 1934, until now.

Q. Now, Mr. James, with reference to your wife Winona, and particularly the occasion when you were on the top of Pike's Peak, did you give her any whiskey, or did she take any whiskey?

A. No, she never took a drink of Whiskey in her life, that anybody could see.

[fol. 2066] Q. Was she a woman that ever drank?

A. She never drank a drop in her life.

Q. Now, referring to another subject for the moment, Mr. James, directing your attention to the occasion that has been testified to here concerning the occurrence on Verdugo Road, on the afternoon of August 4th, or the night of August 4th, 1935, did you at that time give to your wife, Mary, any Whiskey?

A. My wife, Mary, could not drink any whiskey at that time. She was so sick she could hardly keep a drink of water on her stomach.

Q. Well, did you give her any at all?

A. I did not.

Q. And you state at that time she was nauseated, and having trouble keeping water and food upon her stomach?

A. That is right.

Q. Now, Mr. James, after you were arrested, you have already related here the circumstances under which you were held out at your home on La Salle Street, from Sunday morning until Tuesday morning, at which time you were booked up here in the County jail. Now, after that time, on a Saturday, you were taken by the officers, were you not, and some discussion was held with you, is that right?

A. That is right.

Q. And about what time of day was that when the officers took you out of the jail, out of the jail tank?

[fol. 2067] A. Well, I don't know what time of day; I think it was between 11:00 and 1:00 o'clock.

Between 11:00 and 1:00. And when were you returned to your tank?

A. Well, they just took me back to the Chaplain's room,

and they had Hope there, and they told me the story he had told them. They asked me what I had to say about it. I told them I had nothing to say about it.

Q. Now, after that occurrence did you have some discussion with the officers off and on, lasting throughout the night, and into the early morning of the next morning?

A. Yes.

Q. And were the officers continuously talking with you from that time until early morning?

A. Yes, I hadn't any more than got back to my tank until they sent for me again, and they took me out of the jail.

Q. And this conversation with the officers was held where? In the District Attorney's office?

A. Well, for a while it was held there.

Q. And where else?

A. And they took me up to where I lived on Verdugo Road.

Q. Did they have some conversation with you there?

A. Yes.

Q. Then what did they do after the conversation on Verdugo Road?

A. They brought me back to the District Attorney's office. [fol. 2068] Q. And was the conversation continuous? Did they continue to talk to you?

A. Until 3:00 o'clock next morning.

Q. Now, a statement was read here by Miss Adams, a young lady reporter here. Do you recall having seen her down in the District Attorney's office upon that occasion?

A. Yes, I saw her down there.

Q. Now, do you remember whether or not you made the statements to her, and to the officers who were there present, that were attributed to you by the statement which she read here?

A. Well, I couldn't remember all that was in the statement. I remember some things that were in there, that I made.

Q. And what were the circumstances under which you made that statement? Tell us what occurred just before that happened?

A. Well, they had had me there constantly——

Mr. Williams: If your Honor please, I believe this has already been gone into on voir dire examination.

Mr. Parsons: That doesn't preclude me—we may offer

some testimony on voir dire, and then you put in the statement. I am endeavoring to speed up this trial, but there are one or two phases of it that I don't believe were fully covered.

Mr. Williams: We have no objection to anything in addi- [fol. 2069] tion to what he has already testified to.

The Court: Suppose you go as far as you can. It may be necessary occasionally for you to cover some ground that you have covered before.

Mr. Parsons: I have no intention of doing it, your Honor.

The Court: You may proceed, then.

By Mr. Parsons:

Q. Mr. James, you remember having testified before about a good many of these items, and there are some other things which I wish to develop here. Now, prior to your making this statement down in the office of the District Attorney did you have any particular conversation with Mr. Fitts?

A. I did.

Q. What, if anything, did he say to you?

A. He was the one that was doing most of the talking. Do you want me to tell what he said?

Q. Yes, tell us what he said. I don't believe that you covered that fully.

A. Well, he read Hope's story over to me many, many times, and asked me what I knew about it, and I told him I knew nothing about it. He questioned me and questioned me about different things in Colorado, and everywhere else, and I told him I knew nothing about it. He continued to question me until later on in the evening. I was very sick. I was hungry; I was tired, and I told him a thousand times that I didn't know anything about Hope's story. About [fol. 2070] 10:00 or 11:00 o'clock that night he began to get pretty rough with me. He said, "Now, you have heard the story over and over, and we are going to clean it up, and you had just as well tell me now, because we will be sitting here until Monday morning." I still told him that I didn't know anything about the story; I had never heard of any rattlesnakes; I had never seen one, and that the whole story sounded screwy to me, and that I didn't understand the story. He told me that everybody in town was trying to storm the jail, that he had officers going around getting shot-

guns, going to keep the mob from lynching me. He tried to frighten me that way, and I told him that I didn't know anything about the story. About 12:00 o'clock all of the officers—there were about 15 or 20 around there all evening,—cleared the room and sent Mr. Jack Southard in to talk to me, and you heard me tell you just what Jack Southard told me he was going to do if I didn't give them the statement, and admit the things that they wanted me to admit. I didn't know the story. I had heard it. I had heard them tell it over and over and over, and when they told me that they was going to take me out to that house, and what they was going to do to me, I told them that if they wouldn't do it, I would try to tell them the story as I had heard it, and when I did try to tell them the story, every time I would get off the story one of the officers would stop me, and say, "Didn't this or that happen?", which I [fol. 2071] had promised them I would tell if they didn't take me out there and punish me any more. When I heard the story here the other day it was almost as new to me as it was to you folks.

Q. Were the statements that you made there to the officers, and reported by Miss Adams who testified here, were they given by you as the truth, or were they given by you to end this further questioning?

A. They were given by me to end this further questioning. There was none of it true.

Q. And immediately after your being indicted you went down here and entered a plea of not guilty, didn't you?

Mr. Williams: That is objected to, if your Honor please——

The Court: Objection sustained.

By Mr. Parsons:

Q. Now, Mr. James, did you have occasion to meet Miss Reed, this woman here who has testified, this Madge Reed, or Mrs. Reed?

A. Yes, I met her.

Q. What were the circumstances under which you met her?

A. I met her at the Italian Village one afternoon when I went down there to lunch, and I stayed down, and I had some cocktails. I got to drinking, and I became pretty intoxicated, and I didn't go back to my business that after-

noon. My wife was away on a convention, and I didn't feel so good when I went down there, and I got to drinking, and I stayed there until about 5:00 o'clock, and I felt like I [fol. 2072] wanted to go home, and I had got acquainted with her and some other woman. I asked her if she could drive a car. She said she could. I asked her to drive me home, that I was drinking, and I was afraid I might have an accident and get arrested, and she said she would drive me home, and on the way home she let this other woman out somewhere; I don't know where; but she did take me home. I don't know whether I passed out, or went to sleep on the way home, but when I woke up my wife was home bathing my face with cold water, about midnight.

Q. Now, did this woman ever have any conversation with you about money?

A. Yes, I saw her a day or two later when she came to my barber shop. She said she wanted to see me. She told me about taking me home. She said I promised to give her $10.00, I believe. She said that my wife came home while she was there, and took her down to a bus, and she caught a taxicab to town, and spent $3.00 for it, and spent $1.00 for her dinner. She said I didn't give her any money, and that I owed her $10.00. I gave it to her, and that was the last I seen of Madge Reed after my wife's death.

Q. Did you ever go down and stay all night at a hotel with this woman at Hermosa Beach, or any other place?

A. I never did.

[fol. 2073] Q. Did you ever tell this woman that you would give her a sum of money, $1,000.00 or $2,000.00, or any other sum to testify as a surprise witness or any other sort of a witness in your behalf in the event you were indicted?

A. I did not. I never thought of such a thing.

Q. Did you, by the way, ever tell Mr. Hope or ask Mr. Hope to testify that he had witnessed your marriage and that if he would so testify that you would pay him a sum of money, approximately $1,000.00?

A. I never had any reason for wanting to tell the man I would pay him for seeing me married?

Q. Did you ever tell anybody such a thing?

A. Why no.

Q. Did you ever offer anybody any money to testify with reference to any matter in connection with this matter?

A. I did not.

Q. Have you offered any witness any money to testify

here in your behalf or in connection with any of these matters?

A. I never have.

Q. Now, with reference to the insurance that was taken out on your wife, Mary, just briefly relate the circumstances under which that insurance was taken out. Did you want a drink of water, Mr. James?

A. Please. When I met Mary, March, 1935, she came to my beauty shop to go to work.

Mr. Williams: Just a minute. I think the witness's an-
[fol. 2074] swer should be limited to matters that are not hearsay. It is obvious that he is starting in a couple of months before there was any contact with any agent. Therefore, I object.

A. The agent was contacted——

Mr. Parsons: Just a minute, please.

The Court: Just a minute. Your attorney will take care of the questions.

Mr. Parsons: Perhaps the answer, the manner in which it came, is my fault for not specifically directing his attention. Mr. James, when was the first time the matter of insurance was discussed, with reference to your wife, Mary, with her?

A. About two weeks after she came to work for me around the 1st of March.

Q. And what were the circumstances under which that subject was discussed?

Mr. Williams: We ask that the witness be specifically directed not to relate any conversation between himself and Mary.

The Court: The conversation with Mary would be inadmissible. The fact that there was a conversation on the subject, however, would be admissible.

By Mr. Parsons:

Q. Was that subject discussed between you and your wife, Mary?

A. It was.

Q. And was the subject of whether or not she desired to
[fol. 2075] take out life insurance discussed with her?

Mr. Williams: That is objected to as being leading, putting the answer of what was said in the witness's mouth.

The Court: I think so. It would be an indirect method of getting hearsay testimony into the record. Objection sustained.

Mr. Parsons: How long after this discussion of insurance with your wife, Mary, upon the first occasion was it discussed again?

A. It was discussed every few days until she got the insurance.

Q. And when the insurance was finally procured who made the arrangements for the procuring and the obtaining of the policy, you or Mrs. James?

A. Well, I don't know if I just understand that right.

Q. Well, who carried on the discussion, I will put it a little plainer, who carried on the discussions with the life insurance agent with reference to obtaining the insurance upon her life?

A. She and I both.

Q. And when the insurance was obtained who paid for it?

A. She paid for the insurance.

Q. And did you ever have any discussion with Mr. Galatz pertaining to the insurance after the death of your wife?

A. I did.

Q. And where was that?

[fol. 2076] A. At the barber shop.

Q. At about when was that?

A. You said after her death?

Q. Yes.

A. Well, it was, I think, two or three weeks after her death.

Q. And what was that discussion?

A. Well, he came up to the barber shop to collect my insurance on the policies I had taken out with him, and I talked with him about the claim that I had against the company and he said that—I told him that the company had started action against me to rescind the policy.

Q. Was that a fact? Had the company done that?

A. It had. And he said that if the company didn't pay that claim that he would resign. He would not write insurance for a company that would not pay, and he insisted that I pay the premium on the policies that I was holding with the company. I told him "No", that I would not pay the premiums with a company that would not pay the insur-

ance, and I refused to pay. He said "It would be a good thing for you and your law suit if you would keep the premiums up until after your law suit was over." I told him I was going to sue the company and I told him I would not pay it anyway, and then I did not see him again for two or three weeks.

Q. And did you see him upon an occasion two or three weeks thereafter?

[fol. 2077] A. I did.

Q. Did you have a discussion with him then with reference to the payment of the life insurance upon the life of your wife, Mary, your deceased wife, then?

A. I did.

Q. And where was that discussion?

A. He was in my barber shop getting a haircut and I told him that I had started action against the company or was going to, and he said, "The company does not believe that you are going to sue them for that insurance." I said, "Why don't the company believe that I am going to sue them for that insurance?" And he said, "Of course, the Coroner's jury didn't completely exonerate you of your wife's death and consequently feels there should be a murder charge against you if you do that." I said, "I am going to sue them, and I will do it if they break my neck", which I did, sue the company.

Q. And subsequently—strike that. Referring now to the 5th day of August, 1935, Monday, August 5th, when was the last time upon that date that you saw your wife alive?

A. Well, I went to work that morning.

Q. And about what time of the day was that?

A. It was somewheres maybe quarter of 7:00 or 7:00 o'clock.

Q. In the morning?

A. Yes sir, in the morning.

Q. And what was her condition at that time?

[fol 2078] A. Well, she was very nauseated at that time. She had been very restless through the night. She had been up several times and she was so nauseated that I wouldn't cook any breakfast. So I quit eating breakfast at home and when I started to leave she was sitting up in the bed and I went in and told her, "If I was you I would sleep awhile because you have been very restless all night." I was not sleeping in the bedroom with her because she had been so restless I couldn't sleep with her. Whenever she

would turn on the light and go to the bathroom, naturally she would wake me up and I insisted that she sleep alone. And she said that she would get up, that she felt as bad in bed as if she was up."

Q. So it was about 10 o'clock in the morning when you last saw her alive, is that right?

A. That is right.

Q. Now, when did you next see her at all?

A. I saw her next when I went home that night about 8 o'clock.

Q. And when you arrived at home who was with you, if anybody?

A. Mr. Pemberton and Viola Lueck.

Q. And you arrived home about 8 o'clock?

A. We did.

Q. And where did you folks go, if any place, when you reached home?

[fol. 2079] A. Well, when we reached home it was always my habit—the garage was right back of the driveway—and I always drove my car into the garage and parked it there for the night, and went into the house through the back door. We all drove in the garage and parked the car and got the steaks that were in the car and entered the house through the back door.

Q. Now, what did you do after you entered the house?

A. Well, of course, the house was dark and my wife knew they were staying there for dinner and naturally I thought she had gone to sleep. I had found her asleep on other evenings with the light off and I had asked her not to do that because it frightened me, but that night I thought she was asleep.

We went from one room in the house to the other and I didn't find her. And sometimes she would go to sleep on the front porch so we opened the door and went out there and she wasn't there. Of course, we became very alarmed about it and naturally, I felt maybe that—she had fainted several times and I thought maybe she had fainted around the chicken house in some way, and we got two flashlights and Mr. Pemberton and I went out the back door and I went up to the hen house and looked for her and he found her on the side of the house in the fish pond.

Q. Did you hear him cry out?

A. Yes, he cried out about the time I reached the kitchen.

[fol. 2080] Q. Did you come back to his direction?

A. Yes, he met me by the back of the house.

Q. Did you have some conversation with him?

A. Well, he was all excited and I could tell by his voice that something had happened and when I got to him he told me, "Brace up. Your wife is gone." I could see her from my flashlight and he tried to keep me from going to her, but I went to her anyhow.

Q. Now, where did you find her body? Previous to this —Just look at Exhibit 1, and particularly the fish pond and can you indicate to the jury where her body was found?

A. Well, I do not know as I could just exactly say where her body was found, whether that would be true or not, because I was so excited that I didn't pay any attention, but it was somewhere along that side.

Q. Somewhere along this side?

A. Yes, sir.

Mr. Williams: Indicating the east side.

Mr. Parsons: I will fix it. If I do not, you call me down.

Q. And you have indicated from about the point that is on the east side of the fish pond to the figure marked "2" here in blue, is that right?

A. I would think it was right in there.

Q. So that it was along the east side of the pond between this point 86 and the point 2, is that right?

A. Yes.

[fol. 2081] Q. And was she dead then apparently?

A. Yes, she was dead, because I put my arms around her and I tried two or three times to lift her out of the water and I liked to fall in the water with her.

Q. And you had been near her at the fish pond before that day, had you? That particular day you had been there?

A. Well, I hadn't been home since morning.

Q. Now, what time did you arrive at work that morning?

A. I think I arrived at work somewhere between 8:30 and 9:00 o'clock.

Q. And were you at the shop for any considerable time during that day?

A. I was out long enough to get my lunch.

Q. About how long was that?

A. I never stayed over 30 minutes.

Q. And would you say that was probably true upon that day?

A. Yes, sir.

Q. Now, what time did you leave your establishment on the previous Saturday night, August the 3rd?

A. Well, I don't remember just the minute I left there, but I closed my barber shop at 7 o'clock that night and what patrons were in there, we take care of, and we don't let any more in, and then after we get through with them, it is my business to check up the week's wages and pay the labor and sometimes it is 7:30 or 8:00 when I get out every [fol. 2082] night.

Q. And on that particular Saturday night would you say it was approximately 7:30 or 8:00 o'clock when you left the establishment?

A. I would.

* * * * * * *

[fol. 2083] Robert S. James, resumed the stand and testified as follows:

Direct examination (Continued).

By Mr. Parsons:

Q. Now, Mr. James, on Saturday August 3rd, did you see Mr. Hope upon that date at all?

A. I did.

Q. And at about what time did you see him on Saturday, August 3rd?

A. Well, I don't know just what time of day it was. Saturday is an awful busy day for me.

Q. Well, your best judgment now.

A. I think it was maybe around 10 or 11 o'clock in the morning.

Q. Did you have some conversation with him at that time?

A. I did.

Q. And where was that conversation?

A. In the barber shop.

Q. And what was said between you?

A. Well, he came in and said he had been working at Long Beach. I hadn't seen him for some little time and he said that he lost his job down there and he wanted to go down

[fol. 2084] for his pay check, and he might have a lot of running around to do down there and he asked me if he could use my car and I let him have my car to go down Saturday afternoon. And while he was gone he filed a prescription for me for my wife and I think about 5:30 he brought my car back and brought the keys to the barber shop. I didn't go out of the shop.

Q. Now, when did you see him again after that Saturday night? Did you see him until the following day, Sunday?

A. I saw him the next day about 11 o'clock.

Q. Where did you see Mr. Hope on Sunday?

A. He came to my house.

Q. And did you have some conversation with him then?

A. I did.

Q. And what was that conversation?

A. Well, he told me what he had come up there for, and in fact he told me the day before that he was coming and what he was coming for.

Q. What did he say?

A. He said he had made arrangements with my wife to perform an operation on her.

Q. And what had he said along that line? What was the sum and substance of it?

A. Well, that was the biggest part of it.

Q. And what did you say to him when he told you that?

A. Well, I told him that she told me about it Friday night and I begged her not to do it and I knew she was in a [fol. 2085] very delicate condition and I didn't want her to go through with it and I wanted her to go to the hospital because I was paying a hospital tuition where it wouldn't cost me anything. And she said, "I won't be played."

Mr. Williams: Now, just a minute; we are apparently getting into a conversation with his wife.

By Mr. Parsons:

Q. Did you discuss that subject with your wife? The subject about her having something done about the fact that she was in a family way?

Mr. Williams: That is objected to as hearsay.

The Court: Sustained.

By Mr. Parsons:

Q. Well, was that subject discussed?

Mr. Williams: The same objection.
The Court: Same ruling.

By Mr. Parsons:

Q. Now, with reference to this matter, this discussion which you had with Mr. Hope, did you have a further discussion with him upon that subject on Sunday?

A. Yes, he came to the house Sunday morning.

Q. And what was said then?

A. Well, he told me what he had come for and I told him that I knew about it and I didn't want him to tell me anything about it, that it was against my wishes. And I had left my money in the cash drawer the night before and I got in my car and drove down to the shop and got my money and came back to the house by 1 o'clock and Mr. Hope stayed there with my wife and took care of her while I was gone.

[fol. 2086] Q. What time did Hope leave on Sunday?

A. He left my house about 1 o'clock.

Q. And did you make any arrangements with him about the use of your automobile?

A. He said he would return it that night, but he didn't return it until 6:30 Monday morning.

Q. And from Sunday approximately 1 o'clock in the afternoon until 6:30 Monday morning, did you see Mr. Hope at all?

A. I did not.

Q. And when he returned with the car Monday morning, did you have any conversation with him with reference to his delay in returning the car?

A. We had quite an argument about him keeping the car all night and keeping me worried about it.

Q. When you left Monday morning, left your home to go to work, where was Mr. Hope at that time, if you know?

A. Mr. Hope was at my house when I left for work.

Q. And is that the last time you saw him that day?

A. That was the last time I saw him that day.

Q. Had you had any previous plans for a dinner engagement on Monday night?

A. I did.

Q. And with whom had those arrangements been made for dinner?

A. Mr. and Mrs. Pemberton.

[fol. 2087] Q. And when were those arrangements made, approximately?

A. They visited us Wednesday—Thursday night, before my wife's death Monday, and they made an appointment with my wife to have dinner with them at their apartment Monday night, and Monday morning when I started to work my wife was ill, and she didn't feel like going to town. She had planned to have her hair fixed that day, and stay over there until noon and have dinner with them, so she asked me to 'phone Mrs. Pemberton and tell her that she was not able to come to town, and for them to come out to the house, and I did, and met them, and they went home with me.

Q. Now, did your wife have any money? Had you given her any cash at about this time?

A. I gave her $100.00 Saturday morning.

Q. Did you ever give Mr. Hope $100.00?

A. The most money Mr. Hope ever got off of me in one sum was $5.00.

Q. Did you ever slip your hand under an apron in the barber shop, and slip him $100.00, and tell him not to try to give it back to you?

A. No.

Q. Now, referring to another subject, Mr. James, and I might state I am picking up a lot of loose ends. There is so much territory. I hope your Honor doesn't think perhaps my mind appears to be muddled, but there are a lot of various subjects that only one or two questions can be [fol. 2088] directed to. With reference to how you were dressed at Pike's Peak, Mr. James, will you tell us how you were dressed upon the occasion of this accident?

A. Well, I had on an old brown suit of clothes that I use around the house, around my chicken pens, and places, that I never wore any other time, and I had some old shoes that I always kept around the house, because I didn't wear my good shoes out around the chicken pen.

Q. Did you ever tell in substance, or effect, this Mr. Dunnington who was here and testified, that you had on a new pair of shoes up Pike's Peak?

A. No.

Q. Did you ever have any discussion with Mr. Dunning-

ton about how it came that your shoes had been untarnished in your walk down Pike's Peak?

A. He never mentioned to me about any shoes.

Q. You and Mr. Dunnington had had some words, had you not?

A. Yes, we are not on friendly terms.

Q. And he is a business competitor of yours in that neighborhood?

A. Yes, when I got hurt on Pike's Peak I sold him my barber shop, and when I came back—that was in 1932—and when I came back in 1934 I put in a barber shop within a block from him, and since then he has been my bitter enemy, because he thought that I should not put in the [fol. 2089] barber shop there, because I had taken a lot of business away from him there.

Q. Now, with reference to your insurance, and the application for the payment of money in connection with your wife's, Winona's, death, did you have some conversation with Mr. Pries, an insurance man, who was here?

A. I did.

Q. And where was that conversation held?

A. The first conversation was held in the lobby of the Trinity Hotel shortly after I arrived back here from burying my wife.

Q. And were you at that time having some difficulty in getting the papers ready to present to the company?

A. I wasn't have any difficulty. I just decided to make the papers out, and I met him, and he said he would make them out for me, because he knew how to make them out so that there would not be any delay.

Q. And what did you and he do with reference to preparing the papers, the application for the payment on the policy?

A. We went in the lobby and sat down to a table, and I got him the death certificate, and then I noticed that on the death certificate, while he was making out the papers, that it said that my wife's death was caused by drowning. He asked me about it, and I told him I didn't know anything about it, and that is the way the Coroner got it out in [fol. 2090] Colorado Springs. He said, "I will write the Coroner and see if he will put the contributing cause on the certificate," and he did, and we got an answer a few days later—he came out to my mother-in-law's house, and I was there, and my wife's father and sister were there,

and my father-in-law dictated the letter to my sister-in-law, and she wrote the letter back to Dr. Gilmore.

Q. Now, at that time did you suggest any of the matters that should go into the letter, or did he dictate the letter?

A. Mr. Pries dictated the entire letter. I don't know anything about what he was dictating.

Q. And how much education have you had in school, Mr. James?

A. Well, I went to school very little in my life.

Q. Is it with some difficulty that you write letters?

A. Well, I write such bad handwriting that I am ashamed to write, and I have always insisted on some one writing a letter for me.

Q. Do you know about how long you went to a classroom in school? Do you recall that?

A. Less than six months in all my life.

Q. And what knowledge you have has been from your experience in living, and what you have learned in a business way?

A. Correct.

Q. Now, Mr. James, you have testified here that you had [fol. 2091] a hernia. Did you ever have a hernia prior to the time that you were interrogated by the District Attorney's investigators for some two days out on La Salle Avenue?

A. No.

Q. Now, did you ever have any indication of this hernia, prior to the time that you were kept out there at the house?

A. I have never had any trouble with my side at all. A few years ago the Doctor told me I had an attack of appendicitis, but I never had any developments from that.

Q. Did you ever have any pain or swelling about the abdominal region, prior to the time that you were out there with the District Attorney's investigators?

A. Not that I remember.

Q. Now, do you know Mr. McKelvey who testified here?

A. I do.

Q. And he is the gentleman, I believe, that testified that you purchased a Pierce Arrow automobile from him?

A. That is right.

Q. Did you ever in substance or effect tell him that the accident in Colorado was caused by the breaking of a steering knuckle?

A. I don't remember ever talking to him about my accident there.

Q. Did you purchase an automobile from him?

A. Yes, I bought a Pierce Arrow coupe from him, a second-hand automobile.

[fol. 2092] Q. And is that the only discussion you ever had with him?

A. To my knowledge it is.

Q. Now, you knew Miss Yarnell here, did you not, who came over here from Colorado Springs to testify against you?

A. I did.

Q. And was she some relation to your wife, Winona?

A. She was a cousin to her.

Q. And during the time that you were at Colorado Springs did you see her?

A. I saw her most every day.

Q. And did you upon any occasion ever kiss her?

A. Many times.

Q. And did you ever attempt to make a date with her, or make love to her in the usual fashion, or any other way?

A. I did not. The only time I ever kissed her was right around the hospital where my wife would be there.

Q. Did you ever kiss her except as a friendly act?

A. Never did. She used to kiss me, and tease my wife about it.

Q. When you left Colorado Springs, upon the depot platform in public view, what did you do with reference to kissing her?

A. She kissed me goodbye the day I left her.

Q. And at that time did you have some conversation with her about the many kindnesses she had extended to you while you were there in this difficulty?

[fols. 2093-2103] A. Yes, I told her how much I appreciated it, and how much I appreciated her automobile, and the kindness of her family, and I gave her $20.00 and told her it was for the use of her car, and the gasoline I had used.

Q. And had she, during the time you were at Colorado Springs, taken you about the city?

A. Yes, she took me to the hospital from the hotel nearly every night.

Q. Now, where was the hospital located with reference

to the central part of Colorado Springs, or the portion where you were stopping, staying?

A. Well, it was quite a ways out from town. It was very inconvenient to get in and out there. I don't think there was a bus line out there, and that is why I used her car so much.

* * * * * * *

[fols. 2104-2109] Robert S. James resumes stand.

Direct examination (Continued).

* * * * * * *

[fol. 2110] Q. Now, during the time that your wife, Mary, was sick, this illness prior to her death, did she have any fainting or dizzy spells?

A. Yes, she had many of those.

Q. And was she from time to time treated by a doctor?

A. Well, I had the doctor once or twice; I don't just remember, out to the house.

Q. Now, how was your wife, Mary, dressed the night that you found her in the fish pond?

A. She had on yellow-flowered pajamas.

Q. And did she ever have a night gown in the house?

A. If she did, I didn't know anything about it. She [fol. 2111] always slept in pajamas.

Q. And how was your wife dressed on the morning of August 5th, when you last saw her alive?

A. The morning I left and saw her alive she had on, it was a kind of a two-toned pajamas, kind of a rose and a copper color, made by the Real Silk Hosiery people. I don't know just what color you would call them, but she had slept in them that night.

Q. Did your wife have a pair of rose colored pajamas with a smock.

A. Those are the ones I mean. They are kind of rose colored, and the top are kind of brown, copper color.

Q. Did you have some conversation with your wife, Mary, before you left home on the morning of August 5th?

A. I did.

Q. And was Hope present?

A. He was.

Q. What was that conversation?

A. Well, after he and I argued about my car, we went into the house, and he asked me how my wife was. I told him she wanted to see him, and he went into the room to talk to her, and she told him that she hadn't started to menstruate, and he said that he would take care of that, and for me to go on to work, and that he would probably spend the day there, but he didn't spend the day. He called me by 'phone during the day and told *he* he had to come to town.

[fol. 2112] Q. Now, when you returned home with the Pembertons on the night of August 5th, was there a letter there in the house? Did you sometime during the evening see a letter in the house written in your wife's handwriting?

A. I didn't see the letter. I think Miss Lueck found the letter, but I didn't see it that night.

Q. When were you first shown the letter?

A. I never was shown the letter until sitting there at the table. I had seen it printed in the newspaper.

Q. Did you ever cause your wife to write such a letter?

A. I did not.

Q. And did you know that she had written such a letter? Until you were advised of it?

A. I didn't know anything about the letter until Miss Lueck said something about it.

Q. Now, did you have some conversation with the officers about the letter your wife had written?

A. I did.

Q. And when was that conversation?

A. It was in the District Attorney's office the night that I made the statement.

Q. And what was that conversation? Who was present, if you recall?

A. Mr. Southard and I. He told me to tell him the statement that I made my wife very drunk and insisted that she write that letter, and that I had dictated it.

[fol. 2113] Q. And what did you say?

A. I told him I would tell it.

Q. And did you ever at any time, on either August 4th or August 5th, give your wife any whiskey?

A. No, I never gave her any whiskey. She couldn't drink any whiskey. There was plenty of it at the house if she wanted it.

Q. Was there whiskey in the house?

A. Several quarts there that people had brought up to give us a drink out of, and I would insist that she would not drink whiskey. That was before she got sick, because it never did agree with her.

Q. Now, did you have some dogs about your premises?

A. I had three bull dogs while I was there.

Q. Did you keep those about the premises at night?

A. I kept them shut up in the garage of a night, so that they wouldn't disturb people barking of a morning before I got up, and during the day I kept them in my chicken pen, to protect my chickens while I was away.

Q. Now, during the time that your wife and you lived at 1329 Verdugo Road, did she do any work about the yard and the chicken coops, attending to the chickens?

A. Well, while she was working in the beauty shop with me I took care of the chickens, and took care of the housework, but after she was ill I wasn't doing very good with my chickens, and she told me I didn't know how to raise [fol. 2114] little chickens, and she took over the work of raising the baby chickens, and also watering the lawn.

Q. Now, did you—pardon me just a moment. Did you know Mr. Taggart, who worked for Mr. Hoffman, Mr. James?

A. Yes, I remember seeing him at the automobile company.

Q. And were you down there looking at the automobiles?

A. Yes.

* * * * * * *

[fol. 2115] Q. Now, prior to the death of your wife, Mary, had you ever had any discussion with her with reference to a cut upon her foot?

A. I had.

Q. And did she at that time have a cut upon her foot?

A. She did.

[fol. 2116] Q. Do you know how she came by the cut on her foot?

A. She told me she went barefooted around the house because she had some bad corns, and she cut her foot out in the yard, she told me on a tin can.

Q. Now, was she in the habit of going about the yard without any sandals or anything that way, from time to time?

A. Practically all the time she lived there, I mean while she was very ill, she went barefooted.

Q. Now, do you know whether or not that cut was upon the toe or where it was upon the foot?

A. She told me she cut her toe.

Q. Did you ever pay any particular attention to it?

A. I did not because at night she had her shoes on and I paid no attention to it.

Q. Now, what was your wife's condition prior to her death with reference to sleeplessness?

A. Well, she had been very restless practically all the time.

Q. And had the doctor prescribed anything for her sleeplessness or had any medicine been used by her?

A. Yes, sir.

Q. Who was the doctor?

A. Dr. George.

Q. Now, while you were in Colorado, did you receive any money from Mr. Dunnington, the barber?

A. I did.

[fol. 2117] Q. And what were the circumstances under which you received that money?

A. Well, when I started on my vacation, a short time before that Mr. Dunnington had been working for me and he was out of work and I asked him if he would work five or six weeks for me while I was on my vacation, and I made him the manager of the barber shop while I was gone, and what money was coming from the barber shop, he should keep it in the bank, and after I had my accident, I wrote him to send me $100.00 at the time, which he did. When I came back to town I checked up with him and I still had some money coming.

Q. Was that money in any way out of his pocket to you?

A. No, was not out of his pocket to me, but out of the receipts from my business.

Q. Now, some time later, or about that time, you sold the shop to him, did you not?

A. Well, after I returned and buried my wife, I stayed there and I was nervous and I couldn't go to work. I was sick. I sold him the barber shop for $1,000.00. I don't remember the date I sold it to him, but it was between October the 14th and Christmas.

Q. And did you then go to Alabama?

A. No, I hadn't gone to Alabama. I had taken me an

apartment out here away from everybody where I could be left alone. I didn't want to see anybody, and nobody but the landlady knew who I was and my friends knew where I [fols. 2118-2120] was. On January the 4th I received a telegram from my sister that my mother had passed away and I left that night for Birmingham.

Q. And did you borrow any money on the Kansas City Life Insurance policy?

A. We borrowed, I think, $150.00 on the Kansas City Life Insurance Company policy the day we left on our vacation.

Q. Whose policy was that?

A. My wife's policy.

Q. Now, the insurance on your wife, Winona, was how much, approximately?

A. Do you mean altogether?

Q. Yes.

A. Altogether she had three policies. She had a policy for $1,000.00 and one for $5,000.00 and one for $3,000.00.

Q. And that was paid, was it?

A. Yes, it was paid about a year or so afterwards.

* * * * * * *

[fol. 2121-2123] Q. Now, at the time you were in Colorado, Mr. James?

* * * * * * *

[fol. 2124] A. Miss Yarnell wrote, I think, every letter for me that I wrote myself while I was there; I dictated it.

Q. Now, you were taken after your arrest, were you not, Mr. James, to a snake pit down at Ocean Park?

A. I was.

Q. And who was present, if you recall?

A. Do you mean the officers?

Q. Yes. As near as you can remember?

A. Well, there was four or f officers with me in one car and there was four or five with Hope in another car. They took us to the snake pit.

[fol. 2125] Q. Did you see Mr. Allman there?

A. That is the little black-haired man?

Q. The man who testified here.

A. Yes.

Q. Mike Allman, I think they call him.

A. Yes.

Q. What was said and done there in your presence?

A. They took us in the show and paraded us around on one side of the pit, and Mr. Griffen called him out of the pit, and he come up there, and he said, "Here is two fellows I have got here." He said, "Do you know these two men?", and he pointed to Hope, and he said, "I know that man, but this one I don't know him. I don't think I have ever seen him."

Q. Was anything further said upon that matter?

A. Yes. Griffen went ahead to tell him that we were the men that came down there and bought the rattlesnakes from him, and asked him to identify me again. He said, "I can identify this man, but," he said, "that man, I couldn't swear to his identification."

Q. When he referred to "that man", whom did he refer to?

A. He referred to me.

Q. Now, did you have any conversation with Mr. Allman there with reference to your identity?

A. I did.

Q. What did you say, and what did he say?

[fol. 2126] A. I told him that they were trying to connect me with a crime. I said, "If you are not positive of my identification, don't you tell the officers that you have seen me here.", so he said, "I wouldn't swear that I have seen you here."

Q. When you had this conversation in the District Attorney's office on the night of May 2nd, was there anything said about the fact your statement would be used against you?

A. I didn't know whether the statement would be used against me, or not. I would rather die than to have gone back to that house and went through torture like the three days I was out there. I didn't care whether the statement was taken, or not.

* * * * * * *

By Mr. Williams:

Q. Mr. James, I believe you stated you were very fond of your wife?

[fol. 2127] A. Very much.

Q. And when you discovered her dead body in the fish pond on the night of August 5th, 1935, you knew at that time that she and Hope had been discussing the matter of the commission of an operation by Hope on her, did you?

A. I did.

Q. And Hope had told you that morning that he intended to do something to do away with her pregnancy?

A. He did.

Q. Did you believe, then, when you saw her dead body there that she had died as the result of an operation performed, or attempted to be performed by Hope on her?

A. No.

Q. You didn't believe that?

A. No.

Q. You didn't believe that Hope had anything whatsoever to do with her death?

A. I didn't think so.

Q. Now, I believe you said that she had fainted several times during her pregnancy?

A. She had.

Q. And had she fainted in your presence?

A. Yes, sir.

Q. And had she also reported to you that she had fainted outside of your presence?

A. I don't know whether she did that, or not, but I have {fol. 2128} seen her faint when she was cooking around the house.

Q. In other words, you had seen her faint on more than one occasion, had you?

A. Yes.

Q. How many times would you say that she had fainted, to your knowledge, prior to her death?

A. I saw her faint two or three times, and I saw her get so sick many times that she had to go fall across the bed.

Q. And did that fainting impress itself upon your mind?

A. What do you mean by that?

Q. I mean did you regard it seriously, something that you thought about and worried about?

A. I only regarded it at the time she would be cooking. She didn't seem to have those sick spells any other time.

Q. The fainting was something which impressed itself upon your mind and your memory, was it?

A. Oh, yes.

Q. Now Mr. James, do you remember having testified in the United States District Court, before the Honorable Leon R. Yankwich, in the case of Robert S. James against the Mutual Life Insurance Company of New York, wherein you testified on March 31st, 1936?

A. I do.

Q. And did you at that time, in response to the following questions, make the following answers:

Mr. Parsons: Just a minute. I submit if he is reading [fol. 2129] from a written transcript, which it now appears that he is, he should show the transcript to the witness.

Mr. Barnes: We are not reading from a written transcript, we are reading from notes.

The Court: Well, in any event the requirement that the transcript should be shown to the witness would only be under the general law. The objection will be overruled.

Mr. Williams: (Reading): "Q.—Do you remember you took your sister and your wife to the Lion Farm, and your wife fainted? A.—I remember going to the Lion Farm, but my wife didn't faint. Q.—She didn't? A.—No. Q.—Didn't she faint about that time? A.—No. I never knew her to faint in my life."

Q. Did you so state?

[fol. 2130] A. I might have stated it that way, but I was meaning before her pregnancy. I admitted several times after——

Q. Did you admit you made the remark "No, I never before in my life"?

A. I may have said it.

Q. Well, did you or did you not?

Mr. Parsons: He has answered.

The Court: He said, "I may have", which is not an answer. In other words, Mr. James, if you recall, you ought to be able to state whether you did or did not say that.

A. Well, they asked me many questions——

Q. Just a minute; did you say it or didn't you say it? You- answer should be to one of three questions, did you or did you not or do you remember?

A. I don't remember.

By Mr. Williams:

Q. Now, you have told us that your financial condition at the time during August, 1935 was very good, and you

didn't owe any money and you had $400.00 or $500.00 in the bank, is that correct?

A. Approximately that.

Q. And was that true on the day that your wife's body was found—namely that you had approximately $400.00 or $500.00 in the bank and didn't owe any money to anybody?

A. I don't know of any money that I owed to anybody, but I don't think I had that much money in the bank at that time.

Q. How much money did you have in the bank?

[fol. 2131] A. Well, I don't know what money I had in the bank. Lois Wright had it in the bank in her name, I didn't carry a bank account myself.

Q. You kept all your money in Lois Wright's name?

A. Yes, sir.

. . . . . .

[fol. 2132] By Mr. Williams:

Q. Isn't it a fact that the reason that you had your money in Lois Wright's name is because you owed a judgment of about $5,000.00 which you didn't desire to pay?

A. There is a judgment in Alabama against me, yes.

Q. For the sum of about $5,000.00?

A. I think so.

Q. Now, will you state whether at the time of your wife's death you had any money of any kind, either personal or in Lois Wright's name in the bank?

A. I had none personally; I don't know how much I had in the bank in Lois Wright's name.

Q. What did you mean by your testimony that you gave yesterday that you had four or five hundred dollars in the bank?

. . . . . .

[fol. 2133] A. Well, what I meant by that I felt at the time that maybe I had a couple of hundred dollars in the bank in Lois' name and I think my wife had some money at home and I always had a couple of hundred dollars in my pockets and around my business.

Q. When you were testifying yesterday then you meant to convey the idea that in some way or another, whether what your wife had about the house or what Lois had in your

name or otherwise, that you did have four or five hundred dollars?

A. That is what I meant.

Q. At the time of your wife's death?

[fol. 2134] A. Yes.

Q. Now, you stated yesterday that you gave your wife $100.00 on the Saturday preceding her death. Did you know at the time you gave that $100.00 to her that she had two or three hundred dollars around the house some place?

A. No.

Q. When did you reach the conclusion that she had two or three hundred dollars around the house some place?

A. I never reached the conclusion that she had two or three hundred dollars.

Q. What did you mean when you said a few moments ago that your wife usually did have two or three hundred dollars around the house?

A. I think you misunderstood me.

Mr. Silverman: I think the Court will permit you to explain that, Mr. James.

The Court: Yes, you may explain it if you want to.

A. I said around my business, and what money I had around the house what Lois had that I probably thought I had four or five hundred dollars.

Q. And did you at that time, in August of 1935, believe that you had about four or five hundred dollars at the time of your wife's death?

A. With the money of the business and so forth, sure.

Q. Now, Mr. James, on the 7th day of August, 1935, at the premises of number 1329 Verdugo Road in the presence [fol. 2135] of Deputy Sheriffs Virgil Gray and Willard Killion and E. F. Lynch, statement reporter from the Sheriff's office, that is to say two days after your wife's death, did you not in response to the following questions give the following answers: "Q—What is your financial condition, Mr. James? A—My financial conditions? I don't have any money at all. I just have about what I earn is all. Q—Have you any bank account? A—No. Q—When is the last time you had any money in the bank? A—The last time I had was when I equipped my beauty shop for Mary when she came over to work and we decided to get married. I equipped that beauty shop at the barber shop. I had been

sub-letting, and they furnished it so I equipped that, and I spent over a thousand dollars in that. Q—How long ago was that? A—I believe it was in March. Q—And at that time you used up all the surplus money you had? A—Well, I didn't use it all, I guess I had six or seven hundred dollars left. I bought Mary's engagement ring, a wedding ring, diamond. They cost me quite a little bit of money. Q—How much? A—Let's see. The wedding ring I think this insurance agent I was telling you about being a customer and friend of mine for a long time said he could get the wedding ring for half price. I believe it was eighty some dollars. Q—What did the engagement ring cost? A—Well, the setting cost me sixty some odd dollars and I had a pretty good size stone put in myself and then there was some—there was some smaller stones that cost about $3.00 apiece. [fol. 2136] A—She didn't have that on the time she fell in the pond? A—No, the girl found them back in the dresser drawer. I put them in my pocket. I was afraid somebody would pick them up. Q—What became of the balance of the six or seven hundred dollars? A—Well, I have spent it here and there. I don't know, my sister came out to see us, and I paid, I practically paid her way. I don't know, it seemed like I owed some little bills around that I cleaned up. I practically spent it all. Q—At the present time you haven't any bank account? A—No. Q—What bank did you do business with? A—I didn't do business with any bank."

Did you so answer in response to those questions?

A. I probably did.

Q. Well, would you say that you did or didn't?

A. To the best of my recollection I answer the questions that I could remember.

Q. Well, is there any one of those answers that I read to you that you would say that you didn't give?

A. Well, I wouldn't say that there were any that I didn't give.

Q. Now, when you married Winona, what was her business?

A. The last work that Winona had done, to my knowledge, was a bookkeeper at the Howard Automobile Company.

Q. She was not engaged in the beauty parlor before that?

A. No.

Q. And Mary was in the beauty parlor with you?

[fol. 2137] A. Yes.

Q. And you paid her a salary of $20.00 a week, did you not?

A. Yes.

Q. Her income then was $20.00 a week?

A. Her income when she was working, $25.00 or better.

Q. Now, when you had this conversation at which Mr. Hope was present, when you had breakfast together, that you have told us about, had you already ascertained at that time that Mary was pregnant?

A. Well, from what she had told me I began to think she was.

Q. Had you had her examined by a doctor at that time to determine whether she was pregnant?

A. No, I don't think so.

Q. So that neither you nor she, at that time, were certain that she was pregnant?

A. No, we had no way of being certain.

Q. And you introduced Mr. Hope as Doctor Smith, didn't you?

A. I did.

Q. And how did you come to introduce him as Doctor Smith?

A. He asked me to.

Q. And that is the only reason you did that?

A. Well, he has always told me that he spent all of his life studying medicine and fooling with dope.

[fol. 2138] Q. And did you believe that at that time?

A. Well, I had no right to disbelieve it.

Q. Well, did you believe it? Just answer that "yes" or "no". You either did or didn't believe it.

A. Well, I would say, well, I didn't have much faith in what he told me.

Q. Did you believe he was a doctor when you introduced him as a doctor?

A. I believed he had been.

Q. Did you believe that his name was Smith?

A. No, I didn't believe that his name was Smith.

Q. But you told your wife that his name was Smith?

A. Yes, sir.

Q. And you told your sister that his name was Smith?

A. Yes, sir.

Q. Why did you tell your sister that his name was Smith?

A. At his request.

Q. And for that reason only?
A. That is the only reason I can think of right now.
Q. Had your wife ever met him before?
A. Well, I don't know whether she had or not.
Q. To your knowledge had she ever met him before?
A. I don't know. She may have seen him in the shop.
Q. Had you ever introduced him before?
A. I don't remember.
[fol. 2139] Q. Now, as I understood your testimony you, on Sunday morning, the 4th of August, went down to the barber shop and got the money that you had had at the barber shop?
A. Yes.
Q. And you drove down in your own car, didn't you?
A. Yes.
Q. Did you go by yourself?
A. Yes, sir.
Q. And while you were gone, Hope and your wife remained at the house?
A. Yes, sir.
Q. And you got back about 1:00 o'clock?
A. I think it was about 1:00 o'clock.
Q. And then you loaned your car to Hope and he went away with the car?
A. He did.
Q. And he didn't return until 6:30 the next morning?
A. That is right.
Q. So that left you without any automobile during the entire afternoon?
A. That is right.
Q. Now, did you and your wife remain at home all afternoon?
A. Not all afternoon.
Q. Where did you go?
A. We walked up the street a ways, and had a sandwich.
[fol. 2140] Q. What time was that?
A. I think we left home about 4:00 o'clock.
Q. What time did you get back?
A. Well, I don't know. We stopped by a school house and had a sandwich. I imagine it was about an hour and a half.
Q. And you say you got back about 5:30?
A. I imagine it was that time of the day.
Q. And your wife walked that distance?

A. That is correct.

Q. That was how great a distance?

A. Oh, about quarter of a mile.

Q. That was in about the neighborhood of La Canada?

A. Yes, sir, about in that neighborhood, or Montrose.

Q. You didn't go outside of Montrose?

A. No, sir.

Q. And you didn't go out of La Canada?

A. No, sir.

Q. Did you leave the place except on that one walk you took?

A. No, sir.

Q. You didn't go riding in the automobile?

A. No, sir.

Q. You are definite about that?

A. I am definite about it.

Q. Well, now, I will ask you whether on the 7th of August, at about 1:45 in the afternoon, at 1329 Verdugo [fol. 2141] Road, in the presence of Deputy Sheriff Virgil Gray, Willard Killian, and Court Reporter Lynch, this being on the 7th of August, 1935, two days after your wife's death was discovered, if you didn't at that time say in response to questions asked by Mr. Killian, as follows: "You were home all day Sunday? A.—Well, practically all day only we just took a little drive along in the afternoon. Q.—Where did you go? A.—Around through Flintridge, and coming back by Glendale." Did you so state in response to those questions?

A. I probably did.

Q. Now, later on in that same conversation, a half hour or an hour later, did Mr. Killian ask you the following questions, and did you give the following answers: "Sunday afternoon after you came back from the ride, you were in the house, or on the front porch, or where? A.—We came back after the ride—I fed my dogs and my chickens, and I was kind of tired, and I went to bed just about dark, I think." Did you so state in response to that question?

A. I probably did.

Q. Well, did you? Is it your best recollection that you did so state?

A. I was almost crazy at the time he was threatening me, and I wouldn't be positive of any of that stuff.

* * * * * * *

[fol. 2142] Q. Now, Mr. James, when this automobile accident occurred up on Pike's Peak, I wish you would tell us just exactly in detail exactly what happened as you now remember it?

[fol. 2143] A. I told you yesterday just what happened. Tell it over?

Q. Well, just state it to me now, in a little more detail. I want to know exactly what happened, the entire detail of it.

A. From the time the car went off?

Q. Yes.

A. As I told you, I was riding on the right-hand side of the car looking through the window with some field-glasses, and I never noticed the car being off the road until it made the lunge off the bank, and as the car rolled down the mountain I practically didn't know what was happening. When I woke up I was laying to the right of the car about 25 feet from it. My wife was lying on the floor with her feet in around the gear shift. Her head was lying out across the running board on the rocks.

Q. What did you do then?

A. When I got up naturally I went to the car, and she was groaning. I picked her up in my arms, and I asked her how bad she was hurt, and she said, "Get a doctor for me." So I was afraid to leave her on the ground. I tried to put her in the car. I raised her up, and tried to get her up in the seat of the car. My back was hurt, and I couldn't get her up to the seat of the car, so I took her out of the car, put her on some blankets, and covered her up. I searched for my pistol. I thought I would shoot it and [fol. 2144] somebody would hear it and come to us. I had no lights, only some matches. When I didn't find my pistol I knew if I didn't leave and go and get some help and get her out of there, the way she was bleeding, she would die in a few minutes. I climbed up the hill. I started to go to the top of the mountain. After walking up the road a little ways I found it hard walking up hill, because my right leg was hurting me so. I turned around and walked down the hill to Glenn Cove. That is where I got the men that went up with the truck. How we knew where the car went off the road was the tracks there, where the car left the road, in the dust.

Q. You didn't go down to her with the men?

A. No.

Q. You say she was lying on the floor board of the car when you first saw her after you came to?

A. She was.

Q. And you were about 25 feet to the right of the automobile when you came to?

A. I was.

Q. How far was the automobile from the place where it had left the road?

A. It was estimated at 150 or 200 feet.

Q. How did you estimate it?

A. That would have been my estimation.

Q. Was that your estimation at the time, that that was about what it was?

[fol. 2145] A. I didn't make any estimation at the time.

Q. When did you make your estimation?

A. I don't know when I made an estimation of it.

Q. Did you make it while you were still in Colorado?

A. I think so. When I went back up looking for money, I think I decided it was about 150 or 200.

Q. You figured it was about 150 or 200 feet then?

A. I did.

Q. Were you as far from the road as your wife was when you came to?

A. About the same distance.

Q. And your wife was in the car, and you were out of the car?

A. I might have been back from an angle. I might have been back of the car maybe a few feet.

Q. But you were approximately——

A. I was close enough that I could see the car. I don't remember just where I was sitting when I woke up.

Q. Now, were there any lights turned on in the car when it went down off the road?

A. I turned the lights off just a few seconds before we went over the bank.

Q. Were the lights on when you came to?

A. I don't remember whether they were on, or not, but if they were, something went wrong with them, because I couldn't leave the lights on when I left the car.

[fol. 2146] Q. When you came to and looked at the car were the lights on so that you could see the car by the lights?

A. I was very dazed; I don't remember.

Q. You testified yesterday that you couldn't see the car, and you had to use a match to see it by.

A. I couldn't see in the car. I struck matches in the car.

Q. You could see the car, itself, however?

A. I could see the car without a light.

Q. Would you say now that the lights were or were not on when you came to and looked at the car?

A. To my best recollection the lights were not on.

Q. In other words, everything was there in the dark, except as you lighted matches to see things?

A. Yes, sir; I couldn't even use my flashlight.

Q. You say you tried to lift your wife up into the seat?

A. I did.

Q. Did you succeed in lifting her up into the seat?

A. I couldn't get her up into the seat.

Q. Was her head as high as the back of the seat where a person's would normally be in sitting, at any time while you were trying to get her up into the seat?

A. No.

Q. Was her head as high as the seat part of the seat, that is, the portion that you sit on, at any time?

A. Her head was higher than that.

[fol. 2147] Q. Her head was higher than that?

A. Sure. When I sat her up in the car she was much higher than the seat.

Q. Did she lean back against the seat while you were working with her?

A. Well, I had her all over the seat, I guess, trying to get her up there. She was bleeding very fast, and I was soaked in blood, myself.

Q. And you definitely remember that you then placed her body out on the ground?

A. I placed her right by the side of the car, on a blanket.

Q. Was she lying in a position parallel to the running board of the car?

A. I think she was.

Q. Which direction was her head? Towards the front or towards the rear of the car?

A. Her head was towards the rear of the car.

Q. And her feet towards the front of the car?

A. Right.

Q. How far from the front of the car did you lay her?

A. She was right by the running board.

Q. How far?

A. I don't know how far; I don't think over two or three feet.

Q. A matter of two or three feet?

[fol. 2148] A. That is about right.

Q. Now, you say you placed one blanket under her?

A. I put one under her, and one over her.

Q. Then you left her?

A. I did.

Q. She was lying in what position? On her back?

A. Naturally she was lying on her back.

Q. Was she unconscious at the time that you left her?

A. She wouldn't talk; she would just groan. I could never get her to talk after she told me to get a doctor.

Q. Now, on the day that you found your wife dead in the bath tub, you say you left the house about 1.30 in the afternoon?

A. I would think it was that time.

Q. You got back about what time?

A. Well, I got back after the mail. I got the mail at 5:00 o'clock, and got my groceries, and went up there in a truck. I imagine 5:30.

Q. And this young man, Gerald Rogers, was with you when you went into the house?

A. He was.

Q. Did you go directly into the bedroom?

A. I did.

Q. Did Rogers go directly into the kitchen?

A. He took the groceries into the kitchen, yes.

Q. When you entered the bedroom was the door between [fol. 2149] the bathroom and the bedroom open?

A. It was.

Q. Did you look from the bedroom into the bathroom?

A. Yes, sir.

Q. Did you there see your wife's body?

A. I did.

Q. And then did you go into the kitchen?

A. I don't think so.

Q. Did you go into the kitchen at any time from the time that you first saw your wife's body until help had come?

A. I don't think so. I took hold of the body and tried to lift her out, and the water was very soapy, and I dropped her a time or two before he got there to help me.

Q. What position was she in in the bath tub when you saw her there?

A. Lying right across the bath tub.

Q. By "across the bath tub" what do you mean?

A. I mean like you would lay yourself 50-50 over a bath tub.

Q. Was there any portion of her body in the bath tub?

A. Yes, sir, her head and shoulders were in it.

Q. Her head and shoulders were in the bath tub?

A. Her thighs and hips were out of the bath tub.

Q. Her thighs and hips were out of the bath tub, were they?

A. Practically, yes.

[fol. 2150] Q. She was lying on her face, that is, face downward in the water?

A. No, she was lying on the side of her head when I first saw her; her head was kind of sideways.

Q. Where was the edge of the bath tub across which she lay, with reference to her hips?

A. I don't know where that was.

Q. Now, when you tried to lift her out of the bath tub, did you succeed in lifting her out?

A. No, I couldn't pick her up.

Q. Did you push her on into the bath tub?

A. I dropped her a couple or three times before I got help.

Q. At any time did she get into that position in the bath tub so that she was lying on her back in the bath tub with her feet sticking out over the rounded end of the bath tub?

A. She might have.

Q. In other words, you pushed her into that position?

A. I might have dropped her into that position. I didn't push her.

Q. Did you lift her entire body towards the bath tub with the idea of putting her into that position?

A. I was trying to pick her up.

Q. You were trying to pick her up; you were trying to get her out of the bath tub, were you not?

[fol. 2151] A. That is right.

Q. Now, the hips portion of her body was out of the bath tub when you first saw her, wasn't it?

A. I think so.

Q. And the only portion of her body that was in the bath tub was her shoulders, arms and head?

A. The biggest part of her body was in the water.

Q. But that didn't include the hips?

A. No.

Q. Now, where were you when you called this boy Gerald Rogers?

A. I had my arms around her in the bath tub.

Q. Did you call to him?

A. I don't know if I called to him, or not.

Q. Didn't you go into the kitchen from the bedroom, going around the bathroom into the kitchen, and open the door of the bathroom in the presence of Gerald Rogers?

A. I would think not. I walked from the bedroom——

Q. Now, let's be clear about this. I don't want your answer "You think not". Did you or did you not do that?

A. I went directly from the bedroom into the bathroom when I saw her, and if I ever went into the kitchen, I don't remember it.

Q. Would you say that you didn't go from the bedroom around through the living room into the kitchen?

A. Before I discovered the body?

[fol. 2152] Q. Before you discovered the body.

A. Yes.

Q. Would you say that you didn't go from the bedroom around through the living room into the kitchen before Gerald Rogers saw her body?

A. Well, I am not so positive about that.

Q. Did you, after seeing her body, go around into the kitchen through the living room, and open the door into the bathroom, in the presence of Gerald Rogers?

A. After I seen her body?

Q. Yes.

A. No. After I saw her body I never took my hands off of her until I got her on to the bed.

Q. Gerald Rogers helped you?

A. He helped me, yes.

Q. Well, now let's be a little surer as to exactly how much of her body was in the tub——

Mr. Parsons: Now, I object—oh, go ahead. I will withdraw it. I thought you had asked it.

Mr. Williams: I might have; I am not certain.

The Court: There is what might be possible ambiguity

in two answers. I was going to suggest that either one or the other of counsel clarify the matter. At one time the witness said that the hip portion of the body was outside of the bath tub, and then another time he answered it that the biggest part of her body was in the water. It seems to [fol. 2153] be a possible inconsistency.

The Witness: What is the question?

[fol. 2153a] Q. Did you so state in response to that question?

A. I remember it was the Sunday before that we went to that place. What was the question?

Q. The question is to describe what portion of her body was in the water.

A. The upper portion of her body was in the water.

Q. Can you indicate on your own body the portion of her body that was in the water?

A. I would say about here.

Q. Indicating about the height of the naval?

A. Maybe a little below that.

Q. And no other portion from that point on was in the water?

A. Yes. Well, I don't know whether it was in the water. There wasn't much water in the bathtub.

Q. How much water was there in the bathtub?

A. I don't know; maybe 15 inches.

Q. And would it be correct to say that from about the point of the naval was in the bathtub and her hips were on the outside part of the bathtub?

A. As near as I can remember that would be correct.

Q. You admit that her hips were outside of the bathtub?

A. The way I would describe it would be that the lower part of her limbs was across the bathtub and her head and shoulders in.

Q. Was it across the bathtub——

[fol. 2153b] A. Across the bathtub near the middle. As far as I can remember her head was almost under.

Q. The bathtub was set against the wall on one side?

A. I think so.

Q. And she was headed against the wall at one end?

A. I don't remember about that.

Q. Was her head against—was her head towards the back wall against the long side of the bathtub?

A. Her head was practically under the faucet.

Q. And her hips and thighs and knees and calves and ankles were outside of the bathtub?

A. As near as I can remember.

Q. Yes. Now, what you did then was to try to lift her out of the bathtub?

A. I did.

Q. And you say that you were unable to do so?

A. Yes, I tried to lift her two or three times.

Q. And in the course of doing that did you push her towards the bathtub?

A. I didn't push her, but I think she fell more into the bathtub.

Q. What part of her body did you take hold of when you tried to lift her out of the bathtub?

A. Right under the arms.

Q. Right under the arms?

A. Yes, sir.

[fol. 2153e] Q. Around the waist?

A. Yes.

Q. And then did you attempt to lift her while you were in that position?

A. Yes, I attempted to lift her.

Q. And did you take hold of her at any place other than around the waist under the arms?

A. I don't think so.

* * * * * * *

[fol. 2154] Q. Now, Mr. James, you stated that your wife cut her toe on a piece of tin can.

A. That is what she told me.

Q. When did she tell you that?

A. Well, I think it was Sunday she told me.

Q. And did she complain that that hurt her?

A. No.

Q. Did she show you the cut?

A. She showed me the cut, that she had cut her foot.

Q. Did you observe whether or not the cut was bleeding?

A. No.

[fol. 2155] Q. You are certain that some time before her death, and you believe it was on Sunday, she told you that she had cut her foot?

A. Yes, sir, she did.

Q. Did she tell you what portion of her foot she had cut?

A. I believe she did. She hurt her toe.

Q. And that is your best recollection?
A. Yes, sir. that is my best recollection.
Q. Is there any doubt about that in your mind?
A. I don't think so.

Q. Well, now, on the 7th of August, two days after your wife was found dead at the house there, in the afternoon, in the presence of Deputy Sheriffs Gray and Killian, and the statement reporter, Lynch, did you state in response to questions by Mr. Killian as follows: "She hadn't had a swollen foot, or cut foot, or toe the Sunday before? A.—Not that I know of, no." Did you make that statement?

A. I don't remember him asking me about the cut. I told him that she didn't have any swollen foot that I knew of.

Q. Let me read you a little more of it and see whether you can remember it. Were the following questions asked, and the following answers given by you: "Q.—Was there anything else the matter with her? A.—Not that I know of. Q.—Did she hurt herself in any way you know of, like cut-[fol. 2156] ting her foot? A.—No, I noticed in that letter she wrote her sister she said she cut her toe, but I didn't know anything about it. Q.—When did she write that letter? A.—Well, we found the letter—this young lady here—the night we found her here—her and her boy friend came up—Mary was going to let them be married here. They were kind of low on money and didn't want to spend much money. Mary thought it would be kind of nice to let them be married here. I had invited them up that night for dinner, to talk about it, and I brought them home with me. She is the one that picked the letter up and saw it was addressed to her sister, and she said that she had cut her foot, and it had swollen or something like that. I was so excited I didn't read the letter; in fact, I never did see it. Q.—She hadn't had a swollen foot or cut foot or toe the Sunday before? A.—Not that I know of, no."

Now, will you state whether you did or did not make the statements that are attributed to you in the questions and answers that I just read?

A. I can state that I don't remember telling him she had a swollen foot, or him asking me about a cut.

Q. But this is the best answer you can give at this time, is it?

A. That is the best answer I can give.

Q. Now, I will ask you whether at a later time, in the same conversation I am talking about, which occurred out at 1329 [fol. 2157] Verdugo Road, whether the following questions were not asked you by Mr. Killian, and the following answers given you: "Q.—You were very close to your wife, that is you talked about any illness the other might have? A.—Yes. Q.—Didn't you know she had an injured foot? A.—No. Q.—Did she walk around the yard barefooted any time? A.—Yes, she has always walked around out here on this pavement. Q.—Barefooted? A.—Yes. Q.—Did she do that on Sunday? A.—Well, I don't know whether she did or not. Q.—Did she tell you anything about cutting her foot on Sunday? A.—No. Q.—You were here all day Sunday? A.—Yes, practically all the time except what time we was out for a ride. Q.—You were with her all day Sunday? A.—Yes. Q.—She said in the letter she cut her toe? A.—I noticed that in the letter, but she didn't say anything to me about cutting her toe." Did you make those answers to those questions?

A. My recollection is that I didn't know anything about her toe being hurt.

Q. The question is did you make the answers in the manner that I just asked you?

A. I don't remember making that answer.

Q. Now, I desire to call your attention to this testimony that I have just read, that you noticed in the letter her having said something about her toe. You had seen the letter at that time?

[fol. 2158] A. No, I hadn't seen the letter.

Q. You hadn't seen the letter?

A. No, I didn't see the letter until the third day.

Q. What did you mean then when you said you noticed in the letter she had cut her toe?

Mr. Parsons: Just a minute. In the last 60 seconds he has stated there that he hadn't seen the letter.

The Court: I think there is reason for sustaining the objection, Mr. Parsons, and one of them is that he made the statement that he didn't remember it.

[fol. 2159] At the present the witness has not stated that he made that statement.

Mr. Parsons: Thank you. I haven't wanted to unnecessarily interrupt the examination.

By Mr. Williams:

Q. Now, Mr. James, and counsel I call your attention to page 2062 of the transcript, that is in volume 32, it being the testimony of this witness yesterday afternoon beginning on line 18 and ending on line 19, the following portions of the answer of the witness: "I looked into the bathroom and I found my wife in the bathtub."

Now, I will state in fairness that I understood the witness to say "I found my wife across the bathtub." I will ask the witness now which he did say, whether across the bathtub—or in the bathtub?

A. Well, I don't know whether I said "in" or "across" the tub.

Q. Well, which is a fact?

A. The fact is that she was across the tub. I would say on an angle across the tub.

Q. And that portion of her body from about the navel up was in the water, is that right?

A. That is right.

Q. Now, on August 7th, two days after your wife's body was found in this fish pond, in the afternoon of that day, at your place at 1329 Verdugo Road in the presence of Deputy Sheriffs Gray and Killion and the statement re-[fol. 2160] porter, Lynch, did you not make the following statement in reference to the following question: "Before you go on from there, what was the condition of your wife when you came home?" That is referring to Winona. "A.—Just was lying right across the bath tub with just her head in. There must have been about 12 inches of water in the tub."

Did you make that answer to that question?

A. That is not the way I meant it.

Q. Well, just answer the question. Did you make such a statement?

A. I don't remember saying that.

Q. Now, Mr. James, I will ask you whether with reference to this Pikes Peak accident in the presence of Mr. Gray and the statement reporter, Lynch, and in response to questions asked by Mr. Killion:

[fol. 2161] "Q.—Was your wife killed as a result of an automobile accident? A.—Well, our car dropped about 475 feet, and my wife was driving. We had gone up on the mountain to spend the day, and not being used to that alti-

tude, I took a terrific headache. In Denver it was weather like this here. Up there it was snow and blizzard. I had two or three pints of whiskey in my car I was taking home to my mother. They can't buy whiskey in that state like you can here. I got cold and a headache and took a few drinks. My wife wanted to drive down. Q.—Where were you? A.—Top of Pike's Peak. My wife said, 'you drove up, let me drive back'. 'You have been drinking.' 'Let me drive'. 'I'll feel better.' I let her drive. I had some field glasses I was watching the sunset with. I had my window down and my head out of the window, so as we was driving along she said, 'turn on the lights', and I said, 'What do you want the lights on for when the sun is shining? So she didn't answer me and in the meantime—I had the car so long—I just reached over and flipped the lights with my finger and put them on.

I don't believe we went half a mile until I got thinking, well, maybe I hurt her feelings, and I just stuck my head out of these glasses as I saw the car ready to tumble. There was nothing I could do. It just kind of spun through the air as I raised up. She had come to a switch back to turn like this. They come down that in second. Instead of making the turn she come right down there. Q.—When you [fol. 2162] dropped there was that to the left side of the road? A.—The road comes straight, and it seems like it is kind of a canyon where you cross over, and the car went right straight over into this canyon. Q.—She was supposed to make a right turn? A.—Yes.

Q.—You were sitting on the righthand side of the car? A.—Yes. Q.—Did you jump? A.—No, I don't know how I got out of the car. I didn't have time to jump. I never did even get to look at her. Q.—Did you go down 450 feet or where? A.—No, I was thrown out about half way down. I was hitting the rocks and was trying to grab them to stop myself. I knew I was rolling but I couldn't stop. Q.—What injuries did you receive? A.—I just was black and blue *all* was all. I didn't break my bones. Q.—What were the extent of her injuries? A.—She had a very bad fractured skull. Her head was just smashed. Q.—How long did she live after that? A.—She lived about a month. Her head was hit here and broke just like a piece of glass all the way round. Q.—She was taken to a hospital? A.—Yes. I come to. It was dark there and when I come to I could see the lights I had flipped on burning down below me. It looked

like it was straight down, so I decided that was my car and began to climb to it. Q.—I thought you said you flipped your lights off? A.—I flipped them on, and by having the lights on, I could locate the car. If the lights had not been on it I would never have known where to go because it was as dark as a dungeon. I climbed to the car. She was lying with her head out and her head was on the running board. [fol. 2163] It was just a bunch of blood running out of her. I tried to sit her up on the side and my back was hurting so i couldn't pick her up. I dragged her out on the ground and tried to fix her head up then I walked to Glen Cove."

Is that what you stated in response to those questions?

A. That is with the exception of the distance of the car and the lights.

Q. You didn't state the matters with respect to the distance of the car and the lights as I read them?

A. The light I was referring to was the light that could be seen in Glen Cove through the canyon, and the distance is if it hadn't hit the rock or the boulder it would have rolled about 475 feet.

Q. Now, it is a fact, is it not, that you collected the insurance from your nephew O'Neil in the month of September, 1934?

A. No. I am not positive when I collected that insurance. It seems to me like that was the time he got killed and I collected the insurance about six months later.

Q. What company was that?

A. It was Government insurance.

Q. I will ask you whether, at the time and place that I have been asking you about, namely on the 7th of August, in the afternoon, at your home at 1329 Verdugo Road in the presence of Deputy Sheriffs Killion and Gray and the statement reporter Lynch, you didn't state in respect to your nephew O'Neil and his insurance as follows, in response to [fol. 2164] the following question: "Q.—Did you carry some insurance on him? A.—No, he carried his insurance. Q.—Who was his beneficiary? A.—I was. Q.—What company carried that insurance? A.—That was Government insurance. Q.—Was he an ex-soldier? A.—He was a Navy man. Q.—How much insurance? A.—$5,000.00. Q.—If it becomes necessary to go into your personal affairs you don't mind? A.—I don't mind. Ask me anything you like. Q.—You say you haven't any money at the present time. What

became of that $5,000.00? A.—That was in September last year, last year ago."

Did you so answer?

A. I might have done. My mind was terribly confused and upset at that time.

Q. Well, would you say you did or did not; that is the question.

A. I don't remember. The record would show that.

Q. Now, did you at any time agree with your wife that it would be all right with you if she had an abortion committed?

A. I begged her not to.

Q. At all times you objected to an abortion; you wanted to have a Bobby Junior, as you put it?

A. Well, at the beginning of it I did.

Q. And your wife suggested that she didn't want to go through with it and she wanted to have an abortion?

A. After she became so ill she wanted to get rid of it.

Q. Now, is it a fact that on the Wednesday preceding your [fol. 2165] wife's death at your house at 1329 Verdugo Road, that in the presence of Mr. Pemberton and Miss Viola Lueck who has just become Mrs. Pemberton, and yourself, that you said to Viola Lueck as follows: "Mary is crazy to have a baby, but I don't want one"?

A. I don't remember that.

Q. Would you say that you didn't say that?

A. I would say that I don't remember stating it.

Q. That is the best answer you can give on that?

A. That is the best I can give you.

Q. Now, Mr. James, you stated this morning that you had a conversation over the telephone with Mr. Hope on the day that you found your wife's body, is that correct?

A. That is correct.

Q. Did he call you or did you call him?

A. He called me.

Q. What did he say to you and what did you say to him?

A. He told me that he was downtown, that he had to come downtown on some business and told me that my wife said to bring some cottage cheese home.

Q. Did he say anything to you on the subject of whether *his* wife had or had not had any operation or abortion performed upon her?

A. My wife?

Q. Whether your wife had, yes.

A. He didn't say anything about it.

[fol. 2166] Q. Did you ask him anything about it?

A. I didn't ask him a thing about it.

Q. You stated this morning that the last thing he said to you, that was said to you before you left home was, that your wife said that Hope was going to help her get rid of the baby.

A. What time are you talking about?

A. On the Monday morning you left home.

* * * * * * *

Mr. Williams: Did you so state, Mr. James?

A. I don't remember saying it that way.

Q. Do you remember what that last thing was that your wife did say to you before you left home?

A. I remember the conversation that she and Hope and I had before I left.

Q. What was that conversation?

A. The conversation was that I told Hope that she wanted to see him and we went in the house and she told Hope she hadn't menstruated yet and he told her that she would and he would stay there with her.

Q. All right, now, when Hope called you in the morning [fol. 2167] over the telephone did you ask him anything about whether your wife had started to menstruate yet?

A. I couldn't talk about anything like that over the 'phone.

Q. Well, did you?

A. No.

Q. Did you ask him anything about your wife's condition?

A. I don't think I asked him anything about it.

* * * * * * *

Mr. Williams: Did you know yourself of your wife having been in the company of anybody after Mr. Hope left her on Monday morning?

A. No.

Q. When was the next time that you talked with Hope after he called you on the telephone on Monday?

A. I don't remember when I saw Hope after my wife's death.

Q. And it was a matter of a number of weeks was it not?

A. I can't remember. It seems like it was after I went back to work in the shop.

Q. When you did see him did you have a conversation [fol. 2168] with him upon the subject of your wife's death?

A. I did.

Q. What did you say to him?

A. I was discussing her death with him.

Q. What did you say to him?

A. I don't know if I remember what all I said to him. I asked him if he had performed the abortion and he said he did. I said, "Why didn't the autopsy surgeon find something wrong with her?" And he said it hadn't had time to show any complications, that there had been anything wrong with her.

Q. Did you make any report to any officer or official to the effect that immediately prior to your wife's death Hope had performed an abortion upon her?

A. Not that I remember of.

Q. Did you believe or suspect that immediately prior to your wife's death Hope had performed or intended to perform an abortion upon her?

Mr. Parsons: Just a moment, it is incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Parsons: Asked and answered in other respects.

The Court: You may answer.

A. That is what he said.

Mr. Williams: I am asking you whether you believed it. Did you believe it?

A. Yes, I believed it.

[fol. 2169] Q. Now, on the 7th day of August what was your belief as to the cause of your wife's death?

Mr. Parsons: I submit I believe it has been asked and answered.

The Court: I don't believe that question has been asked. You may answer.

A. My belief was that she had fainted and fallen into the water.

By Mr. Williams:

Q. Did you believe that the cut which you have referred to in your testimony had had anything to do with her death?

A. No, I never gave it a thought.

Q. Did you believe that the bite of an insect at that time had anything to do with her death?

A. I did not.

Q. Did you at any time ever form the belief that the cut which you have talked about had anything to do with her death?

Mr. Parsons: That is incompetent, irrelevant and immaterial.

The Court: Let me have the question.

(Question read by the reporter.)

The Court: You may answer.

A. That question has got me confused.

The Court: Well, did you at any time think that the injury to her foot had anything to do with her death?

A. No, I didn't know anything about the injury to her [fol. 2170] foot being swollen.

By Mr. Williams:

Q. Do you mean to say you didn't know at any time about this cut on her foot?

Mr. Parsons: No, he hasn't said that. Just a minute.

Mr. Williams: In response to a question about the cut he said something to the effect that he didn't at any time believe something.

Mr. Parsons: I believe the answer should be read.

The Court: Read the answer, please.

(Answer read by the reporter.)

Mr. Williams: Did you form the opinion at any time that an insect bite had contributed to your wife's death?

Mr. Parsons: It is incompetent, irrelevant and immaterial.

The Court: It is preliminary. Overruled.

A. I heard Dr. Wagner's testimony at the inquest and he said that she had a cellulitis infection probably caused by a Black Widow spider bite and then I formed the opinion that the bite might have made my wife sick and caused her ankle to swell and it might have caused her death.

Q. That is based on your assumption that Dr. Wagner

stated at the Coroner's Inquest that she might have been bitten by a Black Widow spider?

A. That is right.

* * * * * * *

[fol. 2171] Mr. Williams: Isn't it a fact that the report which was read is as follows: "Autopsy Report. I performed an autopsy on Mary Emma James August 6th, 1935 at the Los Angeles County Coroner's Mortuary and found a laceration on the plantar surface of the left great toe and an acute cellulitis of the foot and leg, the left thigh was considerably swollen. On opening the body I found the lungs contained a considerable amount of water. There was no disease of any of the vital organs. The uterus [fols. 2172-2174] showed a normal pregnancy of about six weeks duration. Superficial bruises of varying extent were found on various parts of the body. A chemical analysis of the stomach, liver and kidneys was made, but no poison found. The cause of death was drowning, contributary cause acute cellulitis of the left leg. Signed, A. F. Wagner, Los Angeles County Autopsy Surgeon."

Isn't that the report that was read at the Coroner's Inquest?

A. I can't remember all the report.

Q. You didn't hear any testimony regarding the cause of death other than that report at the Coroner's Inquest, did you?

A. That is all the report I heard.

Mr. Williams: That is all.

* * * * * * *

[fol. 2175] Q. Did you believe on the 30th of August, 1935, did you believe that the cause of your wife's death was drowning, contributory cause insect bite?

A. I heard the "cellulitis infection", and I didn't know what it meant, and I asked the man at the coroner's office what that word meant, and he said it was probably caused by a black widow spider bite. That was where I got the idea.

Q. You still haven't answered my question. Did you believe on the 30th of August, 1935, at the time that this oath was administered to you, that the cause of your wife's death was drowning, and the contributory cause insect bite?

Mr. Parsons: I believe he has given an answer.

The Court: I don't believe he has answered it. The question is "Did you?"

A. I believe the death could not have been from the black widow spider.

Mr. Williams: That is all. I have no further questions.

Redirect examination.

By Mr. Parsons:

Q. Now, Mr. James, Mr. Williams inquired of you concerning a judgment which had been obtained against you. So far as you know, was that judgment—was there any action to reduce it to a judgment here in California?

[fol. 2176] A. No, not in California that I know of.

Q. And do you know whether or not a judgment has definitely ever been obtained against you in Alabama?

A. All I know is hearsay. I wasn't there.

Q. And did that arise out of the same difficulty that you had with your sister?

A. It did.

Q. And did you owe anybody any money?

Mr. Williams: Objected to as calling for a conclusion of the witness, in view of the statement.

The Court: I think that is probably true. I think that does call for a conclusion.

Mr. Parsons: Well, I believe on cross examination that they can go further in the matter.

The Court: Well, the difficulty is that you are allowing the witness to interpret his judgment. It is just like a question of Jones owing Smith——

By Mr. Parsons:

Q. Have you ever been served with any judgment against you from Alabama, or any other place? Have you ever received any such service, from Alabama?

A. No.

* * * * * * *

[fols. 2177-2178] Dr. James DeWitt George, recalled as a witness in behalf of the Defendant, having been previously sworn, testified as follows:

Direct examination.

By Mr. Parsons:

Q. Dr. George, in 1935, in the month of July of that year, did you have occasion to treat or consult professionally with Mary Busch James, the wife of the defendant here?

A. Yes, sir. Mrs. James came in my office July 16th for the first time, and I saw her again in her home about two weeks later.

Q. Now, upon the occasion of your first examination on July 16th, did you come to any conclusion with reference to whether or not she was pregnant at that time?

A. I diagnosed pregnancy.

Q. And during the course of your treatment of this woman did she have any symptoms of nausea?

A. Yes, sir.

Q. And at any time did she have any symptoms, or history of sleeplessness?

A. Yes

Q. And did you prescribe for her for sleeplessness?

A. Yes, sir.

* * * * * * *

[fols. 2179-2183] Scott Littleton, called as a witness in behalf of the Defendant, being first duly sworn, testified as follows:

* * * * * * *

[fol. 2184] By Mr. Parsons:

Q. Now, so far as you know, Mr. Littleton, how many hours elapsed from the time of the arrest of Mr. James on the morning of April 19th, until he was permitted to sleep?

Mr. Williams: May I request that your Honor instruct the witness to answer according to his own knowledge?

The Court: Yes, of course, do not give us any statement as to what might have been; just as far as you know.

A. I never saw him sleep.

By Mr. Parsons:

Q. You never saw him sleep?

A. That is right.

Q. And you saw him Sunday off and on until Tuesday sometime, or Wednesday, did you not?

A. Off and on, but not steadily.

Q. Now, how often were you away from the house, and for what hours were you away?

A. Well, from the time that we made the Dictaphone set up at the house until the time of the arrest, I was there almost continuously. However, at the time of the arrest, or after the time of the arrest, I would go to my home in the middle of the evening, or toward the end of the evening, because at that time I had a little trouble with my heart, and needed a rest.

[fol. 2185] Q. Well, how long would you be there at a time, Mr. Littleton?

A. Well, it would vary, Mr. Parsons.

Q. Well, on Sunday—how long were you away Sunday, the 19th?

A. Sunday the 19th?

Q. Yes.

A. Well, now, Sunday the 19th all day long, if I remember correctly, I was very tired in the early part of the evening, and I think I went home about—well, let me see; my best recollection is in the neighborhood of 9:00 o'clock.

Q. About 9:00 o'clock in the evening?

A. Yes, sir.

Q. Do you know when you returned?

A. I returned early the following morning.

Q. About what time?

A. My best recollection again is in the neighborhood of 8:00 o'clock, or possible half past 8:00, or a quarter after 8:00.

Q. Now, you talked with Mr. Hope after his arrest, on the way in from Hermosa Beach to Los Angeles, did you not?

A. Yes.

Q. And I will ask you whether or not any conversation was held with Mr. Hope upon the subject of his testifying, or rather, as to his talking, telling what he knew, if anything, and that it would be to his advantage to do so?

[fol. 2186]

. . . . . .

[fols. 2187-2196] A. No.

By Mr. Parsons:

Q. Well, while you were coming from Hermosa Beach to Los Angeles, you tried to get over to Mr. Hope the idea that the more he talked the better his chance would be in escaping the rope, isn't that a fact?

Mr. Williams: Objected to as leading.

The Court: You may answer. It is simply bearing upon the question that I have in mind that Mr. Hope was interested in a degree in the fact that his testimony would affect his personal case and problem. You may answer.

A. No, I don't recall that I did. It occurred to me that a man with any common sense would know that.

. . . . . .

[fol. 2197] Robert F. Herron, called as a witness in behalf of the People in rebuttal, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Robert F. Herron.

Direct examination.

By Mr. Williams:

Q. Mr. Herron, you are employed by the District Attorney of Los Angeles County?

A. Yes, sir.

Q. In what capacity?

A. Statement reporter, District Attorney's office.

Q. And you have been occupying that position for a great many years, have you not?

A. Yes, sir.

Q. On March 31st, 1936, did you attend a trial in the District Court of the United States for the Southern District of California, before Honorable Leon R. Yankwich, at which time the defendant in this case, Robert S. James, was testifying on the stand?

A. Yes, sir.

Q. I will ask you whether at that time he stated in response to the following questions as follows: "Q—Did you remember you took your sister and your wife to the lion farm and your wife fainted? A—I remember going to the lion farm, but my wife didn't faint. Q—She didn't? A—[fol. 2198] No. Q—Didn't she faint about that time? A—No, I never knew her to faint in my life."

Was that statement made? Were those answers made by the defendant in response to those questions at that time?

A. Yes sir, they were.

* * * * * * *

EDWARD F. LYNCH, recalled as a witness in behalf of the People in rebuttal, having been heretofore duly sworn, testified as follows:

Direct examination.

By Mr. Williams:

Q. Mr. Lynch you have already testified in this case, that you are a statement reporter for the Sheriff of Los Angeles County and have been for a number of years?

A. Yes, sir.

Q. Were you present at the premises located at number 1329 Verdugo Road in La Canada, California, about 1:35 P. M. on August 7th, 1935 at which time there were present Deputy Sheriff Virgil Gray, Willard Killion, Mr. Robert S. James, the defendant in this action?

A. Yes, sir.

Q. At that time and place in answer to questions asked by Mr. Killion were the following answers given by this defendant:

[fol. 2199] "Q. Was there anything else the matter with her?

A. Not that I know of.

Q. Did she have any—did she hurt herself in any way you knew of, like cutting her foot?

A. No, I noticed in that letter she wrote her sister she said she cut her toe, but I didn't know anything about it.

Q. When did she write that letter?

A. Well, we found the letter—this young lady here—the night we found her here—her and her boy friend came up—Mary was going to let them be married here. They were kind of low on money and didn't want to spend much money. Mary thought it would be kind of nice to let them be married here. I had invited them up that night for dinner, to talk about it, and I brought them home with me. She is the one that picked the letter up and saw it was addressed to her sister, and she said that she had cut her foot, and it had swollen or something like that.

I was so excited I didn't read the letter; in fact, I never did see it.

Q. She hadn't had a swollen foot or cut foot or toe the Sunday before?

A. Not that I know of, no."

Were those answers given in response to those questions?

A. Yes, sir.

Q. I will ask you whether or not in answer to questions asked by Mr. Killion the following answers were given:

[fol. 2200] "Q. Was your wife killed as a result of an automobile accident?" Referring to the wife, Winona.

"A. Well, our car dropped about 475 feet, and my wife was driving. We had gone up on the mountain to spend the day, and not being used to that altitude, I took a terrific headache. In Denver it was weather like this here. Up there it was snow and blizzard I had two or three pints of whiskey in my car I was taking home to my mother. They can't buy whiskey in that state like you can here. I got cold and a headache and took a few frinks. My wife wanted to drive down.

Q. Where were you?

A. Top of Pikes Peak. My wife said, 'You drove up, let me drive back.' 'You have been drinking'. 'Let me drive.' 'I'll feel better.'

I let her drive. I had some field glasses I was watching the sunset with. I had my window down and my head out of the window, so as we was driving along she said, 'Turn

on the lights', and I said, 'What do you want the lights on for when the sun is shining?' So she didn't answer me and in the meantime—I had the car so long—I just reached over and flipped the lights with my finger and put them on.

I don't believe we went half a mile until I got thinking, well, maybe I hurt her feelings, and I just stuck my head out of these glasses as I saw the car ready to tumble. [fol. 2201] "There was nothing I could do. It just kind of spun through the air as I raised up. She had come to a switch back to turn like this. They come down that in second. Instead of making the turn she come right down there.

Q. When you dropped there was that to the left side of the road?

A. The road comes straight, and it seems like it is kind of a canyon where you cross over, and the car went right straight over into this canyon.

Q. She was supposed to make a right turn?

A. Yes.

Q. You were sitting on the right hand side of the car?

A. Yes.

Q. Did you jump?

A. No, I don't know how I got out of the car. I didn't have time to jump. I never did even get to look at her.

Q. Did you go down 450 feet or where?

A. No, I was thrown out about half way down. I was hitting the rocks and was trying to grab them to stop myself. I knew I was rolling but I couldn't stop.

Q. What injuries did you receive?

A. I just was black and blue was all. I didn't break any bones.

Q. What were the extent of her injuries?

A. She had a very bad fractured skull. Her head was just smashed.

Q. How long did she live after that?

[fol. 2202] A. She lived about a month. Her head was hit here and broke just like a piece of glass all the way round.

Q. She was taken to a hospital?

A. Yes. I come to. It was dark there and when I come to I could see the lights I had flipped on burning down below me. It looked like it was straight down, so I decided that was my car and began to climb to it.

Q. I thought you said you flipped your lights off?

A. I flipped them on, and by having the lights on, I could locate the car. If the lights had not been on it I would never have known where to go because it was dark as a dungeon. I climbed to the car. She was lying with her head out and her head was on the running board. It was just a bunch of blood running out of her. I tried to sit her up on the side and my back was hurting so I couldn't pick her up. I dragged her out on the ground and tried to fix her head up then I walked to Glen Cove."

Were those answers given to those questions?

A. Yes, sir.

Q. I will ask you whether at that time in response to the following questions the following answers were given by the defendant: "Before you go on from there, what was the condition of you wife when you came home?

A. She was lying right across the bath tub with just her head in. There must have been about 12 inches of water in the tub."

[fol. 2203] Was that answer given to that question?

A. Yes, sir.

Q. In response to questions on the subject of his nephew, O'Neil, did the defendant at the time and place that I have just mentioned make the following answers to the following questions: "Q. Did you carry some insurance on him?

A. No, he carried his insurance.

Q. Who was his beneficiary?

A. I was.

Q. What company carried that policy?

A. That was Government insurance.

Q. Was he an ex-soldier?

A. He was a Navy man.

Q. How much insurance?

A. $5,000.00.

Q. If it becomes necessary to go into your personal affairs you don't mind?

A. I don't mind. Ask me anything you like.

Q. You say you haven't any money at the present time. What became of that $5,000.00?

A. That was in September last year, last year ago."

Did he so answer in response to those questions?

A. Yes, sir.

Q. Did he, in response to the following questions at the same time and place and in the presence of the same persons make the following answers: "Q. You were very close [fol. 2204-2205] to your wife, that is, you talked about any illness the other might have?

A. Yes.

Q. Didn't you know she had an injured foot?

A. No.

Q. Did she walk around in the yard barefooted at any time?

A. Yes, she has always walked around out here on this pavement.

Q. Barefooted?

A. Yes.

Q. Did she do that on Sunday?

A. Well, I don't know whether she did or not.

Q. Did she tell you anything about cutting her foot on Sunday?

A. No.

Q. You were here all day Sunday?

A. Yes, practically all the time except what time we was out having a ride.

Q. You were with her all day Sunday?

A. Yes.

Q. She said in the letter she cut her toe?

A. I notice that in the letter, but she didn't say anything to me about cutting her toe."

Did he so answer in response to those questions?

A. Yes, sir.

* * * * * * *

[fol. 2206] Mr. Parsons: During the course of the cross examination of the defendant and during the course of the reading of various questions and answers during the conducting of the cross examination, reference has been made to the Colorado incident, and at this time I move to strike out all of that testimony upon the grounds and for the reasons heretofore set forth.

The Court: Let the record show that the Court at the time [fols. 2207-2211] that the questions were propounded had the situation in mind and was acting on the theory that a general objection having been made to the Colorado incident, that the Court would of its own accord overrule the

objection as to each question, but didn't desire to interrupt the proceedings. Let the record show that in fairness to the defense it should be assumed that these objections were made at the time the various questions were propounded and that those objections were overruled. The Court feels it is only fair to the defense because the Court insisted that each time the objections would have been made that the objection be deemed to run, and it was only the desire of counsel to conduct the trial in as orderly a manner as possible and the statement that the objection would have been deemed to have been made that kept counsel from objecting to each and every question.

Mr. Williams: I may say on behalf of the People that we understood the objections were going to all of the questions.

Mr. Parsons: Oh, yes. We all understood that.

The Court: I am of the opinion that the objection has been so specifically made that the record is protected so that if this Court is in error in admitting the Colorado matter, it attaches to all the Colorado testimony.

* * * * * * *

[fol. 2212] OBJECTION TO EXHIBITION OF SNAKES

The Court: Sometimes this Court does things without any particular precedent. Perhaps what I am going to do is without precedent, but I think it cannot be criticized. I appreciate, ladies and gentlemen, that the attitude of individuals towards snakes varies very considerable. Some people have a very strong feeling against them, very much impressed adversely by them; other persons are not adversely affected emotionally at all. I want you to be frank with me. Would it, in the slightest degree cause any of you any nervousness if the snakes were kept in the box and placed on the table there by Mr. Williams? I have known people who were so much opposed to snakes that they wouldn't get within 100 feet of them. I have also seen young children handle snakes, harmless ones, of course, [fols. 2213-2236] without the slightest hesitation.

If there is no objection, it may be done then.

Mr. Parsons: If your Honor please, heretofore we made an objection to the introduction of the snakes in evidence as to their being exhibited here at this time, we renew the objection to this procedure.

The Court: The objection will be noted and overruled.

* * * * * * * *

[fol. 2237] Dr. A. F. Wagner, recalled as a witness in behalf of the People in rebuttal, having been heretofore duly sworn, testified as follows:

Mr. Clark: I understand that Dr. Wagner is called in rebuttal, your Honor?

The Court: I so understand it, unless there is some other indication.

Mr. Clark: I just wanted to inquire whether or not the Court had permitted the prosecution to reopen the case.

The Court: No.

Direct examination.

By Mr. Williams:

Q. Dr. Wagner, in your examination of the body of Mary Busch James, did you make any examination of the uterus and vagina and the other——

Mr. Parsons: Just one moment, that is objected to on the ground it is not rebuttal examination, but is part of the prosecution's case in chief.

The Court: Objection overruled. If there be any doubt about it, the Court will permit the reopening of the testi-[fol. 2238] mony for the present subject matter.

Mr. Clark: I have no objection to the matter being reopened for the present, your Honor, but in as much as the substantial right of the defendant may be affected, I think the record ought to be explicit.

The Court: I am permitting it under both theories. I still say, however, that I think it is proper rebuttal because the fact appears to be involved that was not in the case at the time of the direct.

Mr. Clark: I don't want to seem contentious, your Honor, I make the objection and I don't mean to pursue the matter further.

Mr. Williams: I don't think I completed the question, so I will start it over again: At the time that you examined the body of Mary Busch, making your autopsy, did you examine the vaginal region?

A. You mean including the uterus?

Q. Yes.

A. I examined the uterus and the posterior part of the vagina.

Q. What condition did you find to exist in the vagina?

Mr. Clark: May the same objection be shown as the objections heretofore made?

The Court: Yes, the objection will be shown and the objection overruled.

A. I found them in normal condition.

[fol. 2239] By Mr. Williams:

Q. Did you find any evidence of pregnancy?

A. I did.

Q. What was that?

A. There was a pregnancy of six weeks.

Q. In other words, you found a fetus there?

A. Yes, sir.

Q. Did you find any indication of an abortion having been committed?

A. I have not.

Q. Did you find any indication of an abortion having been attempted?

A. No sir, I did.

Mr. Williams: You may cross examine.

Mr. Clark: Were you through?

Mr. Williams: Yes.

Mr. Clark: I beg your pardon.

Cross-examination.

By Mr. Clark:

Q. Now, Doctor, the presence of the fetus in the uterus was absolutely conclusive that an abortion had been committed, that is true, is it not?

A. Yes, sir.

Q. And an abortion might be affected either by drugs or instruments or by violent exercise, might it not?

A. They have happened in connection with those, yes sir.

[fols. 2240-2243] Q. And if an operation was attempted in any other manner than by the way of instruments, you would not be able to ascertain that such an attempt was made?

A. No.

* * * * * * *

JACK SOUTHARD, recalled as a witness in behalf of the People in rebuttal, having been heretofore duly sworn, testified as follows:

Direct examination.

By Mr. Williams:

Q. I will ask you whether, in the District Attorney's office on the night of May 2nd and 3rd, 1936, in a conversation with the defendant you told him that the statement—you told him to tell that he got his wife very drunk and insisted that she write the letter and that he dictated it?

* * * * * * *

[fols. 2244-2245] By Mr. Williams:

Q. Mr. Southard, did you in the District Attorney's office, on the night of May 2nd and 3rd, 1936, have a conversation with the defendant in which you told him to tell that he made his wife very drunk, and insisted that she write that letter, and that he had dictated it?

A. I did not.

* * * * * * *

[fol. 2246] CARL H. SCOBIE, called as a witness in behalf of the People in rebuttal, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Carl H. Scobie.

Direct examination.

By Mr. Williams:

Q. What is your occupation, Mr. Scobie?

A. Salesman for the Hertz Auto Exchange.

Q. And did you ever have any experience in the matter of snakes?

A. I have, yes, sir.

Q. Over what period of time?

A. Approximately 9 years.

Q. And during that time what have you had to do with snakes?

A. I inspected them on various occasions. I have studied and collected them, and donated them to various societies.

A. Have you done any reading on the subject of snakes?

A. Yes, sir.

Q. Have you had any contact with curators of shows, or dealers in snakes?

A. I have, yes, sir.

Q State what that contact has been?

A. I have an uncle, since deceased, but one of the most famous herpotoiogists in th Country, of Atlantic City, who [fol. 2247] has recently died——

Mr. Clark: If your Honor please, I am going to ask that that answer be stricken out, and that I be permitted——

The Court: I think I will strike part of the answer. I will strike the answer. You may reask the question.

Mr. Williams: Did you understand what he said——

A. Well, these conversations I had with my uncle were merely the conversations of a famous herpotologist.

The Court: You may strike out the word "famous".

Mr. Clark: I think that the witness understands that, and just happened to use the word "famous".

The Court: I think the answer was an actual answer to the question.

Mr. Williams: The question was——

The Court: I think we have covered that. I struck out the word "famous".

By Mr. Williams:

Q. My question included any connection, if any, he had in the snake business, without expressing any opinion as to the qualifications of anybody that he did business with.

A. I have discussed reptiles with Dr. Ditmars, and other men, the chief of the St. Louis Zoo, and also the San Diego Zoo, and Mr. Webster, and when we got in a discussion with these gentlemen, we talked snakes in general.

Q. Now, have you, yourself, gathered any snakes in the State of California.

[fol. 2248] A. Yes, I have.

Q. Are you familiar with the variety Crotalus Atrox?

A. I am, yes, sir.

Q. How long have you been familiar with that variety of snake?

A. Approximately 15 years. I will correct that. I think it has been 18 or 20 years.

Q. And have you, yourself, caught any other wild state snakes of that variety?

A. I have, yes, sir.

Q. Can you state of your own knowledge whether snakes of that variety do inhabit the Imperial and Riverside Counties of the State of California?

A. Yes, sir.

Mr. Clark: That is objected to—just a moment. May I have the answer stricken for an objection?

The Court: Make your objection, and then I will rule on the motion to strike.

Mr. Clark: My objection is that the testimony is incompetent, that no foundation has been laid for it.

The Court: Objection overruled.

Mr. Williams: The answer is already in.

The Court: The answer may stand.

Mr. Williams: Can you state when you have captured snakes of the Crotalus Atrox variety in either Riverside or Imperial Counties, in the State of California?

[fol. 2249] Mr. Clark: The same objection to that question that was last stated, your Honor.

The Court: The same ruling, and basing it upon the fact that Dr. Weinberg testified in regard to Atrox not living in California, and I think it is proper, he having produced that testimony, for the prosecution to meet it.

Mr. Clark: I don't think there is any question as to the subject matter being a proper subject of rebuttal. My objection goes to the competency of the witness to give the testimony.

The Court: Objection overruled.

Mr. Williams: Now, will you read the question Mr. O'Brien?

(Question read by the reporter.)

A. I have caught them almost every year with the exception of this year. I haven't gotten out this year yet,—since the year of 1921.

Q. Can you state as to whether those snakes grow in large or small numbers in Riverside and Imperial Counties?

Mr. Clark: That is objected to upon all of the grounds last stated, and upon the further ground that it does not

appear that the witness has had any such experience as would enable him to express an opinion on the subject.

The Court: The objection will be overruled.

A. I haven't found that particular species, as many of them, in California as I have in Western Texas and Ari-[fol. 2250] zona. However, I have found—I usually collect half a dozen or a dozen on each occasion when I go out. I stay out long enough to collect that many.

By Mr. Williams:

Q. Do you mean that variety?

A. Of that variety. I go in for a number of varieties, the different kinds that I like to collect.

Q. And that has been true in the years from 1921 to 1935, inclusive?

A. Since I have been in California, yes, sir.

Q. Now, have you had any experience with the Crotalus Atrox in captivity, as to the length of time that it does live?

A. I have, yes, sir.

Q. And state what your experience has been?

A. I have had one in captivity which lived for 18 months without food. I have one in court now, which I brought in this morning, which has lived for one year, since the first part of July last year, and that snake hasn't fed yet, the same species.

Q. From what source did you get the snake that you have here?

A. I purchased that snake from Mr. Houtenbrink.

Q. Have you had any experience with other Crotalus Atrox, besides those two, living in captivity?

A. Lots of them.

Q. What would you state has been your experience as to [fol. 2251] the average life of snakes of that variety, in captivity?

A. The best I can say on that is the fact I had one approximately 18 months which died after having not fed during that period of time, but I personally had that snake in captivity, which I caught myself in the Imperial Valley and kept 18 months.

Q. What is your experience with reference to rattlesnakes of this variety striking? Are they able to strike from any position except a coiled position?

A. Yes, sir.

Q. Can you describe, for the benefit of the jury, the various positions in which you, yourself, have seen snakes of this particular variety strike?

A. I have seen them strike in all positions. Ordinarily they coil, if they are startled, or if you happen to come up on them suddenly. If you startle them or scare them they will coil, otherwise they will get into a quick striking position, that places their body in sort of an "S" position, and that is the fastest striking position there is. They can strike much faster from that position than they can from a coil.

Q. Now, have you had any experience with snakes striking in any direction except a straight-out direction?

A. A snake is a fairly good judge of what he is striking at. He will strike at any angle.

Q. What about the speed of the strike?

[fol. 2252] A. I can't hear you?

Q. I say, what about the speed at which a rattlesnake strikes?

A. The speed?

Q. Yes.

A. I would say that the rattler, when striking in that position, when his body is in an "S", I would say is much faster than when he is entirely coiled.

Q. Does a rattlesnake, in your experience, have to wait and engage in any reflection before he strikes at a rapidly moving object?

A. No, sir.

Q. What do you know of the eye-sight of a rattlesnake?

A. In my opinion, the eye-sight at a distance over 10 feet away is very poor.

Q. And under 10 feet what is it?

A. He is very, very accurate.

Q. Have you examined the two rattlesnakes which are in evidence as People's Exhibit No. 20 in this case?

A. Referring to the two snakes here, Mr. Williams?

Q. Yes.

A. I have just looked at them. I haven't examined the snakes.

Q. Are they the same variety of snake that you say you have had for a year, and 18 months, respectively?

A. Yes, sir.

[fol. 2253] Mr. Clark: Just a minute. I object to that on the ground it calls for incompetent testimony, that no foun-

dation has been laid for it, that it asks for an opinion which it is not shown that the witness in competent to express.

The Court: The objection will be overruled.

Mr. Williams: You may cross examine.

[fol. 2254] Cross-examination.

By Mr. Clark:

Q. Now, there are rattlesnakes in the Sierra Nevada Mountains in this state, are there not?

A. Yes.

Q. There are rattlesnakes in the Coast Range Mountains, are there not?

A. Yes, sir.

Q. There are rattlesnakes in the Tehachapi Mountains, are there not?

A. Yes, sir.

Q. There are rattlesnakes upon the Mojave Desert, are there not?

A. Yes, sir.

Q. And have you collected rattlesnakes in the Sierra Nevada Mountains?

A. I have, yes sir.

Q. Have you, in collecting rattlesnakes in those mountains, visited the south fork of the Kern River region?

A. I have, yes sir.

Q. Have you visited the foothills of Madiera County?

A. Pretty close to them.

Q. Have you collected rattlesnakes in the Coast Range Mountains also?

A. The Coast Range, that is the Santa Monica Mountains?

Q. Well, I would say the mountains along the western side [fol. 2255] of Fresno and the eastern side of Monterey, that chain of mountains.

A. I haven't collected much in that territory.

Q. Do you think you know the snake you have spoken of as Crotalus Atrox, sufficiently well enough to identify it from other varieties or species?

A. I do, yes sir.

Q. By the way, the term "variety" and "species" have been used here as applied to rattlesnakes. How many distinctive species of rattlesnakes do you recognize?

A. In what territory?

Q. All over the world.

A. About 19 altogether.

Q. And will you just be kind enough to name the 19 species of rattlesnakes?

A. There are some in Central America and other territories which I am not familiar with, but we have in this country those that I have become familiar with. There is one that I am familiar with, the Gray's rattlesnake which comes from Old Mexico.

Q. What is its scientific name, if you please?

A. They all belong to the Crotalus family. There are three others that don't belong to the Crotalus family.

Q. Then you use the term "Crotalus" as identifying a family rather than a species, is that right?

A. A family.

[fol. 2256] Q. And how many different species in your opinion are there embraced in the Crotalus family?

A. How many?

Q. Yes.

A. There are approximately 16.

Q. Now, can you give the specific names of the other members of the Crotalus family other than the Crotalus Atrox?

A. There are a few in the east that I am not familiar with. I have seen them; I am not familiar with them. I haven't studied that particular species of the rattlesnake family, but I am familiar with practically all of the western species.

Q. Let's have the scientific name.

A. The Crotalus Atrox, Price's rattler, Willard rattler.

Q. No, let's have the scientific name.

A. I am not a scientist. My knowledge has been gained through observation.

Q. Then, you don't know the scientific name of any member of the Crotalus family, except the Crotalus Atrox, do you?

A. I do, yes sir.

Q. Do you know it to be true that there are, including South American and the Isthmus, only four different species of rattlesnakes altogether?

A. I believe that is just about right, yes.

Q. Now, as I understand it, you have never made any study of comparative anatomy in any institution of learning, have you?

[fol. 2257] A. I have not. I have dissected all of the anatomy. I have it in formaldehyde.

Q. And you have made no study in any institution of learning of the anatomy of the rattlesnake, have you?

A. Not except under my own observation.

Q. You know nothing of the anatomy of the rattlesnake's eye, except as you have observed rattlesnakes yourself, do you?

A. That is my knowledge, yes sir.

Q. When you said a while ago, that a rattlesnake would strike from almost any position, you never saw a rattlesnake lie on his back and strike upward, did you?

A. No, a rattlesnake doesn't lie on his back to start with.

Q. To that extent your answer was not quite accurate, was it?

Mr. Williams: You don't have to answer that question.

Mr. Clark: I insist on an answer. I expect to follow it up.

The Court: I think an answer is wholly unnecessary.

Mr. Clark: When you gave the answer that a rattlesnake would strike from almost any position, did you have it in your mind that a wound was under consideration here which had been made on the bottom of the toe of an individual?

A. I did not, no sir.

Q. A rattlesnake, in striking, necessarily has how many [fol. 2258] different kinds of movement?

A. I don't understand you.

Q. I say, when a rattlesnake strikes its victim, how many different kinds of movement does it make?

A. It merely strikes; that is all. It coils, ordinarily, if it has an opportunity. It may not coil or it may coil.

Q. If your rattlesnake coils then one kind of movement is the straightening out of the coil, isn't it?

A. O. K.

Q. In that it is very similar to the straightening out of a coiled metal spring, isn't it?

A. Yes, sir.

Q. It, however, must seize its victim with its mouth, mus-n't it?

A. Yes, sir.

Q. And after having done that it must clamp down with the fangs in order to eject the poison, mus-n't it?

A. Yes, sir.

Q. So that where the rattlesnake is coiled and strikes, there are always at least three movements on the part of the rattlesnake, aren't there?

A. There may be three or more.

Q. I say, at least three?

A. I wouldn't say that it is necessary to make three. I have been struck with just one.

[fol. 2259] Q. By a coiled rattlesnake?

A. Yes, sir.

Q. He didn't uncoil?

A. He didn't have a chance to. I had hold of him.

Q. You say you had hold of him?

A. Yes, sir.

Q. And you had hold of him?

A. Yes, sir.

Q. And he struck you?

A. Yes, sir.

Q. What were the effects of the wound, of the striking?

A. I opened it up and used a suction pump immediately, on it. There was some swelling and that is all there was to it. I used two tourniquets on my arm to overcome the bite.

Q. It made two punctures, didn't it?

A. It made one puncture on that occasion.

Q. Only one?

A. Yes, sir.

Q. And did it have two fangs?

A. If you would like me to, I will explain to you how that happened?

Q. I should be interested.

A. I was force feeding a Black Pacific rattlesnake, known as the Crotalus Organus and I had it lying on my lap and I was placing a small mouse down the snake's throat and I had hold of the back of his neck this way, and was pulling the [fol. 2260] skin up this way, and it wouldn't permit the mouse to go through, and I released my hold just a little bit and the snake turned around this way with one fang; I had released just enough so that he happened to put one fang in my finger. That is the way I happened to get bit.

Q. Now, it is true, is it not, that there are many different classes and species of rattlesnakes?

A. There are, yes, sir.

Q. That scientific authorities are not entirely in agreement as to how many different species there are; that is true, isn't it?

A. I think it is, yes.

Q. It is also true, is it not, that as to some varieties the re-

semblances are so close that some authorities may consider two snakes as belonging not only to the same species but to the same variety, while there are other authorities will believe that they are two distinct varieties?

A. There are some reptiles, some rattlesnakes, which cannot be mistaken, however.

Q. Did you ever hear of an authority named Vandenburgh?

A. I have heard of the name. However, I don't know him.

Q. You have never read any scientific articles on rattlesnakes written by such an author?

A. No, sir.

Q. Did you ever hear of an authority on Herpetology, named Schmidt?

[fol. 2261] A. I don't think I have. I have done very little reading on those, Mr. Clark.

Q. Did you ever hear of a man by the name of Ditmars?

A. No.

Q. Or Klauber?

A. Yes, sir.

Q. You have heard of him?

A. Yes sir, I have heard of him.

Q. Have you read any of his writing?

A. Sir?

Q. Have you read any of his writings?

A. I haven't read any of his writing.

Q. You do not base any opinion you express here upon anything that you learned from Mr. Klauber, have you?

A. I have not.

Q. He was one of the curators of reptiles that you talked to?

A. Yes, sir, he was. He was introduced to me by Mr. Brewer, the President of the Los Angeles Zoological Society.

Q. Now, will you tell me whether or not a species or variety of rattlesnakes referred to as Confluentus—are you acquainted with that?

A. Yes sir, I am acquainted with the Confluentus.

Q. Is it a variety of Crotalus, is it not?

A. Sir?

Q. I say it is a variety of the species Crotalus?

[fol. 2262] A. It is a rattlesnake; that is the term.

Q. Is that—Is that a term applied, to your knowledge, to the Diamond Back rattlesnake?

A. No.

Q. I beg your pardon?

A. No, sir.

Q. Isn't it true that the herpetologist named L. M. Klauber, classified the Diamond Back rattlers that are found between San Diego and San Jacinto and in Lower California by that name?

Mr. Williams: I object to that question on the ground that there is no foundation laid and it is incompetent, irrelevant and immaterial.

A. No.

The Court: There is nothing to show that he is acquainted with that variety.

Mr. Clark: Your Honor sustains the objection?

The Court: Yes, upon that ground. It has not been shown that this witness ever heard of the person who wrote about this.

By Mr. Clark:

Q. Will you tell me if you know, whether or not the two rattlesnakes that you saw here in the courtroom, belonged to the variety of Crotalus Atrox?

A. They are Atrox.

Q. What is the difference between the Atrox and the other?

A. That snake is much larger and has no black rings on its tail.

[fol. 2263] Q. Which is larger, the Atrox?

A. Yes, sir.

Q. And it has no rings on its tail, you say?

A. Yes, sir.

Q. Although the other snake, Crotalus Atrox on the other hand is smaller, and does have rings on its tail?

A. It does have rings on its tail.

Q. This Crotalus Atrox does have, is that right?

A. Yes, sir.

Q. I beg pardon?

A. Yes, sir.

Q. And those are the distinguishing features between those two varieties?

A. There are markings also.

Q. All right; what are the distinguishing marks?

A. I am not an authority on the identification of the various snakes. I collected practically or possibly all of them in the United States and I have studied their habits and was interested in markings on the various species. I can identify them.

Q. Well, tell me—I am going to ask you one or two more questions along those lines—is there a variety known as Lucasensis Ruber?

A. They are commonly known as the Red Rug rattler. The coloration——

Q. Well, would you distinguish the one variety from the other? How could you do that?

[fol. 2264] A. The coloration for one thing.

Q. What is the difference in color between the two?

A. The coloration is a dark brick red.

Q. That is, you mean the Lucasensis Ruber?

A. Yes, sir.

Q. Now, tell me whether or not it is true that the color of any rattlesnake is considerably affected by its environment.

A. Yes, sir.

Q. As a matter of fact, all of the different varieties of rattlesnakes depends very much on the environment they are in?

A. That applies to all snakes.

Q. So without knowing the environment in which a rattlesnake lives, you will always have the doubt as to the variety without taking the color into consideration?

A. Yes.

Q. Now, isn't it true that you can tell by the shape of the snake as to the type of snake it is?

A. Yes, sir.

[fol. 2265] Q. What is the condition?

A. I don't know that, but I know the snake by the shape of the head, and the body of the snake.

Q. I believe you said a little while ago that the Atrox was larger than 60 inches. I wish you would tell me how large the smaller Atrox gets to be?

A. How large they get to be?

Q. Yes.

A. I have never measured them on a yard stick, or anything of that sort. I would say they get to be three and a

half or four feet long. I have an Atrox six and a half feet long, which I got in Texas.

Q. That is one that we may call a larger snake?

A. Yes, that is a large Atrox.

Q. How large is a Crotalus Tortugensis?

A. About three feet long.

Q. You have never seen one bigger than three feet in your life?

A. Three and a half is the biggest one I have ever seen.

Q. What variety of rattlesnake is indigenous to that portion of the Coast Range of California, consisting of the Western part of Arizona, also, and the eastern part of Monterey and San Benito Counties?

A. I didn't get your question.

Mr. Williams: The witness has said he did not get it?

Mr. Clark: If he doesn't know, he can say so.

[fol. 2266] A. There is the Black Pacific that I have in my office.

By Mr. Williams:

Q. Are they a large variety? Is that a large variety?

A. They run about four or five feet long.

Q. Do they ever get above six feet long?

A. I have never seen one. I have one here in a jar that is about five and a half feet long.

Q. Isn't it true that the snakes of that origin——

A. I beg your pardon?

Q. Isn't it true that snakes of that type have been found more than 74 inches long?

A. Not by me.

Q. You never caught snakes over there, did you?

A. No.

Q. Now, is there also a variety known as—pardon my pronunciation, but is there a type called "Tortangus"?

A. I have heard of that.

Q. That is somewhat closely related to the Atrox?

A. By the scientific name I couldn't tell you.

Q. Do you know what the difference is between these two varieties of snake?

A. Not unless I saw the snake.

Q. Now, I have just three or four more questions that I would like to ask you. Now, rattlesnakes coil. That is

simply for the purpose of delivering the blow with greater force, and at a greater distance from the central area?

[fol. 2267] A. If it is placing itself in the position to strike. Otherwise, the snake always lies in a coiled position.

Q. You say it always lies in a coiled position?

A. When it is sleeping.

Q. A snake very frequently stretches out to take a sun bath?

A. They don't stay in the sun very long. The sun will kill them.

Q. But they do take a sun bath?

A. Yes, they do take a sun bath.

Q. It is somewhat difficult to measure them, isn't it?

A. Yes.

Q. Now, there is nothing in the coiling of the rattlesnake necessary if they want to strike?

A. I have seen a rat jump over the top of the snake, and he turned this way and bit the rat while the rat was passing over the top of him.

The Court: You mean when he was coiled?

A. Yes, when he was coiled.

By Mr. Clark:

Q. And in that case did he seize the rat with the whole of his mouth, take him right into his mouth?

A. No, he merely fastened on to the rat for about 15 seconds.

Q. Do you know what part of the rat's body the fangs penetrated?

A. I should judge it struck him right back of the ear.

[fol. 2268] Q. Have you ever seen a cat and rattlesnake striking at each other?

A. The cat is usually the winner of the fight.

Q. I beg your pardon?

A. The cat is usually the winner of the fight.

Q. Well, the cat strikes out more rapidly?

A. I would say that the rattler strikes the fastest.

Mr. Clark: That is all.

The Court: We will take our morning recess at this time.

The jury will remember the admonition. We will take a short recess.

(Recess.)

The Court: Let the record show all parties present.

By Mr. Williams:

Q. Mr. Scobie, you spoke of——

Mr. Clark: Pardon me.

Mr. Williams: Hadn't you finished?

Mr. Clark: I hadn't quite finished, no.

Mr. Williams: Oh, I am sorry. I thought you had.

Mr. Clark: If your Honor please, at this time, so that I may not forget it, I desire to offer in evidence in connection with the testimony of Dr. Weinberg those additional portions of the bulletin of Dr. Klauber, which bulletin was filed and marked as Exhibit G. In other words, two certain paragraphs having been offered——

The Court: There have been no paragraphs offered, Mr. Clark. It was marked for indentification merely because [fol. 2269] it had been used in questioning the witness, but nothing was offered into evidence, nor was anything read into the record from the document.

Mr. Clark: I shall have to——

The Court: Produce the record on me, if you think I am wrong.

Mr. Clark: No, I won't say the record shows it. I thank your Honor for expressing the view that the record does not show it, but in view of your Honor's remarks I would like to drop the subject now, and as soon as this witness leaves, or at some convenient time, I would like to call Mr. Weinberg and make the record show what your Honor says is lacking now, unless Mr. Williams wishes to stipulate.

The Court: My recollection is that Mr. Williams used the document for the purpose of cross examination.

Mr. Clark: Yes, and in doing so I expect to show that he read from the document, and after showing that I want to introduce the rest of the document, so that the portion that he read from can be better understood.

The Court: The method of doing that would be to recall the witness who was questioned in regard to it, and ask him whether he was also aware of the fact that the same document said so and so, and so and so. In other words, the

question was directed not as to what was in the publication, but as to what the witness knew on the subject. Permitting it to be marked for identification is not any inti- [fol. 2270] mation in the slightest degree as to its admissibility. My thought has always been that anything that has been used in the courtroom should be marked for identification.

Mr. Clark: I was under the impression that Mr. Williams had read from it, and that the familiar rule could be invoked that the part of the written instrument having been placed in evidence, that the remainder of the instrument is available.

The Court: I don't think you are applying the rule in a proper instance, Mr. Clark. It is quite common in the examination of an expert to say, "Do you know that such and such an authority says this or that?"

Mr. Clark: The Court will recall that when these questions were asked he was not asked if he didn't know generally that Dr. Klauber said certain things, but he was asked if he didn't know that Dr. Klauber said certain things in a certain bulletin, at a certain page.

The Court: That was true. He was asked whether he knew that Dr. Klauber had said certain things. That is preliminary to asking him if he took that into consideration in arriving at his conclusion.

Mr. Clark: And over my objection Dr. Weinberg was compelled to say that he knew that in that particular document Dr. Klauber did say those things which Mr. Williams, by reading, attributed to him.

The Court: I think you are misconceiving the suggestion. [fol. 2271] Let's take another analogy. Suppose a witness on the stand has made a lengthy dissertation on a certain subject matter. He is asked, "Didn't you at that time say so and so?" That would not permit the introduction of the document. He was asked what he based his opinion on. He said on experience and reading. Then he was asked if that was one of the things he took into consideration, and he said "Yes." I think if you want to get in that there are other matters that he took into consideration in reaching his opinion, I will permit you to recall him. I can see no objection to that, but I don't think it admits the entire bulletin in evidence because a question has been asked from that bulletin.

Mr. Clark: Well, I will examine the state of the record

during the noon recess, and take such course in the afternoon as I may be advised. I simply didn't want to close the cross examination of Mr. Scobie before taking this matter up with Mr. Williams. In view of the ruling that the Court has now made, I don't think I care to ask Mr. Scobie any further questions at this time.

Redirect examination.

By Mr. Williams:

Q. Mr. Scobie, I have before me here a glass jar containing a dead snake, and I will ask you what variety that snake is?

[fol. 2272] Mr. Clark: That is objected to on the ground it is not redirect examination, and that it is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Clark: May I further add to the objection that the witness is not competent to express an opinion?

The Court: The direct examination of this witness related to the type referred to as Crotalus Atrox. Mr. Clark went into a large number of varieties, which had not been mentioned on direct examination.

Mr. Clark: For the purpose of testing the competency of the witness, to show that he couldn't distinguish between one variety and the other.

The Court: That is true, and since you have adopted that line of cross examination, which was not gone into on direct examination, this may be gone into.

A. That is Crotalus Atrox.

By Mr. Williams:

Q. Is that a snake which belongs to you?

A. Yes, sir.

Mr. Clark: May I preserve my objection throughout, that the evidence is incompetent, irrelevant and immaterial, and that no foundation has been laid for it, and that it not only has not been shown that the witness is competent to express an opinion, but it has appeared affirmatively that he is not so competent?

The Court: Objection overruled.

[fol. 2273] Mr. Clark: It will be understood that I am in-

sisting on that objection throughout the further examination of the witness?

The Court: Yes.

Mr. Williams: May this be referred to as People's Exhibit 76 for identification?

The Court: 76.

By Mr. Williams:

Q. I observe, by referring to the snake in this jar, People's Exhibit 76 for identification, that the mouth is open, and that what appears to me to be fangs, and the tongue, and the entire interior of the mouth are exposed? That is correct, is it?

A. Yes, sir.

Q. Is that a typical mouth of a Crotalus Atrox when it is open?

A. No, sir, it is not.

Q. In what particular isn't it?

Mr. Clark: That is objected to upon the additional ground that it not being a typical mouth, it is immaterial how this varies from it.

The Court: The objection is a premature objection, until we know the differentiation.

Mr. Clark: May it appear now that I object to the further interrogation of the witness concerning an object not introduced in evidence, except insofar as such interrogation is necessary to lay a foundation?

[fol. 2274] The Court: I am assuming that these questions are for the purpose of laying a foundation.

Mr. Clark: The question that has been asked seems to have no tendency that way.

The Court: The best answer to that, Mr. Clark, is your own objection. If it were so far from being a typical mouth so as to have no value as evidence, the Court would exclude it. If the difference between this and a typical mouth were some immaterial feature, the ruling might be otherwise.

Mr. Clark: I think that answer should conclude the matter.

The Court: Not at all, Mr. Clark. For example, just as illustration, there might be a slight niche on one of the teeth; that would not be typical of Crotalus Atrox. That wouldn't exclude it.

Mr. Clark: Since that is your Honor's view, I must submit with the best grace I can, and do submit, if not with grace, at least wholeheartedly, having in mind, your Honor, that the County jail is not comfortable at this time of year.

The Court: Well, there is no danger of you being accused of any contempt of court. I don't know of any person who has a higher respect for courts than you have, but courts can't always agree with counsel. The objection is overruled. You may answer.

By Mr. Williams:

Q. In what respect does this mouth differ from a typical mouth of Crotalus Atrox?

Mr. Clark: That is objected to.

[fol. 2275] The Court: I have already overruled the objection.

A. I placed this snake in formaldehyde after rigor mortis had set in, and there wasn't room enough to open the mouth as it would be if the snake were in a biting position. I just opened it to show the fangs.

By Mr. Williams:

Q. In other words, if the snake were alive and in a biting position, the mouth would be further open?

A. The upper portion would be back farther.

Q. The upper portion of the head being hinged so that it does raise back?

A. In other words, if the mouth were entirely open, and the snake were alive, the fangs would naturally come out.

Mr. Barnes: Mr. Williams, some of the jurors can't see the exhibit the way you are standing.

The Court: With all respect to the jury, I don't think it is necessary. The exhibit is not yet in evidence.

Mr. Williams:

Q. Are the fangs, and tongue, and mouth typical of Crotalus Atrox?

A. Yes, sir.

Mr. Clark: We, of course,——

The Court: Same objection and same ruling.

A. Yes, sir.

Mr. Williams: Now, if your Honor please, at this time, for the purpose of illustration only, I offer People's Exhibit 76 for identification in evidence, and ask that the jury [fol. 2276] be permitted to examine it for the purpose of seeing matters that were shown by the exhibit.

Mr. Clark: We object to it upon the ground that it is incompetent as evidence in this case, that no foundation has been laid for its introduction, and that it does not relate to, and is not relevant to any of the issues, throws no light upon any question of fact which is involved.

The Court: The objection will be overruled, and just for the purpose of the record I may say that it certainly is relevant and responsive to the introduction in evidence by the defense of Exhibit E, which also is the head of a dead rattlesnake.

Mr. Clark: Exhibit E was introduced simply as an illustration.

The Court: Mr. Clark, this is only received for the purpose of illustration.

Mr. Clark: What does it illustrate?

The Court: I don't want to comment on a question of fact.

Mr. Clark: I beg your Honor's pardon. I shouldn't have asked that question.

The Court: I may answer it by saying it would probably illustrate the same thing your Exhibit E illustrates.

Mr. Clark: May I apologize for asking the question? I didn't manifest the respect that I should manifest for the Court, and I feel that the question addressed to your Honor was improper and so I apologize.

[fol. 2277] The Court: There is no occasion for it. I would not have noticed it if you hadn't mentioned it.

Mr. Williams: May I exhibit this to the jury?

The Court: It may be that the jury will not desire to handle the exhibit, even in the jar. I think you might give the jury an opportunity to examine it.

Mr. Clark: May I make this suggestion, your Honor?

The Court: Yes.

Mr. Clark: Of course, when it comes to a matter being received in evidence, if I have any question as to its admissibility, my duty is to object. After it is received in evidence I have no right to do anything other than to facilitate its proper use. Therefore, since it is received in evidence, and is proper for the jury to examine, why would it not be as well to place the jar here upon the railing, withdraw

the witness from the stand temporarily, and let such of the jurors that care to examine it, come down and look at it?

The Court: I think that is a good suggestion, except we might do it after the witness has left the stand, at the end of his examination.

Mr. Clark: I have no desire whatever as to when it be done, your Honor.

Mr. Williams:

Q. Now, you said in your direct examination, and also on cross examination, that you had in your possession in the courtroom a snake of the Crotalus Atrox variety, which [fol. 2278] you had had in captivity for more than a year?

A. Yes, sir.

Q. Is that the snake here in the courtroom?

A. Yes, sir.

Q. Will you bring it up here?

A. Do you want the box, or the snake?

Q. The box with the snake in it. Don't take the snake out of the box. Now, this box that you have just produced with the screen top contains the snake to which you referred in your testimony, does it?

A. Yes, sir.

Mr. Williams: We offer it in evidence as People's Exhibit No. 77 at this time.

Mr. Clark: To which we object on the ground that the evidence is incompetent, irrelevant and immaterial, does not tend to prove any fact in this case, and that no foundation has been laid for its introduction, that branch of the objection being based upon our contention that the witness upon the stand has not been shown competent to identify the species or variety of the snake.

The Court: Not upon that ground, necessarily, but upon a ground which may be somewhat original; I don't know any precedent for it; I am willing to take steps toward creating the precedent, if necessary. I am going to sustain the objection. My reason for sustaining the objection is that the exhibit is not one which the jury could examine [fol. 2279] in a manner which would enable them to gain any fair or accurate information. The nature of the exhibit is such that the examination naturally could not be made by the jury, and it might be even possible that a misunderstanding might be created by receiving this particular

exhibit in evidence, it being offered merely for the purpose of illustration, if admissible at all. The objection will be sustained.

Mr. Williams:

Q. Now, on cross examination you were questioned with reference to a character of snake which was called the Crotalus Organus, or the Black Pacific rattler. I show you now a jar which I will ask permission to refer to as People's Exhibit No. ——

The Court: 78.

Mr. Williams: ——78 for identification, and I will ask you whether or not that contains a snake which is of the type known as the Crotalus Organus, or Black Pacific rattler?

Mr. Clark: At this time, your Honor, I again direct your attention to the fact that without stating it I am relying on the same objections heretofore interposed.

[fols. 2280-2291] The Court: The same objection will be assumed and the same ruling. Objection overruled.

By Mr. Williams:

Q. And is that snake a snake typical of the variety known as the Tortugensis Atrox? I observe that this mouth—as far as the interior of the mouth is concerned is it a typical mouth?

A. Yes, sir.

Q. Is that the type of snake that bit you?

A. Yes, in fact that is the snake that bit me.

Mr. Williams: We offer it in evidence.

Mr. Clark: To which we object upon the ground——

The Court: The objection is sustained.

Mr. Williams: That is all; I have no further questions.

* * * * * * *

[fols. 2292-2310] STIPULATION

Mr. Parsons: I understand, Mr. Williams, that you will stipulate that if the Court Reporter who took the proceedings at the Inquest, that he would testify that he took down the following, that his notes showed the following: "Q. What was the condition of her health? A. She was anemic,

that is what the doctor said and being pregnant she was subject to these dizzy spells.

Q. Had she told you of any fainting spells that she had? A. Yes, and every thing she would eat would nauseate her and she just felt miserable. She was sick. She said, 'I don't know whether I am sitting in this room or the next one I just feel so miserable'."

Mr. Williams: So stipulated.

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[fol. 2311] IN SUPERIOR COURT OF LOS ANGELES COUNTY

MINUTE ENTRY—May 6, 1936

Convened at 9:30 A. M., Present: Hon. Thomas L. Ambrose, Judge; E. C. Averre, Deputy Clerk; J. A. Dixon and H. K. Egley, Deputies Sheriff; J. E. Noon, Reporter (9:30 A. M. to 4:30 P. M.) and the following proceedings were had:

In re Return of the Grand Jury

Comes now the Grand Jury into Court, 19 Members being present.

District Attorney Buron Fitts, Deputy District Attorney E. D. Williams and Deputy District Attorney U. U. Blalock also present.

The following Indictments are presented in open Court by George Warren, Foreman of the Grand Jury, in the presence of the Grand Jury and ordered filed, to-wit:

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64218

Major Raymond Lisenba, Charles H. Hope. Bench Warrants issued. No bail for either Defendant.

[fol. 2312] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

INDICTMENT. MURDER

The said Major Raymond Lisenba and Charles H. Hope are accused by the Grand Jury of the County of Los An-

geles, State of California, by this Indictment, of the crime of Murder, a felony, committed prior to the finding of this Indictment, and as follows:

That on or about the 5th day of August, 1935, at and in the County of Los Angeles, State of California, the said defendants, Major Raymond Lisenba and Charles H. Hope did willfully, unlawfully and feloniously and with malice aforethought, murder one Mary Emma James, a human being.

Witnesses examined before the Grand Jury:

Charles H. Hope.
Mrs. Charles H. Hope.
Major Raymond Lisenba.
Jou Houtenbrink.
Mike Allman.
Madge Reed.
Jack Southard.

[fol. 2313] (Endorsed:) No. 64218. In the Superior Court of the County of Los Angeles, State of California. The People of the State of California, Plaintiff, versus Major Raymond Lisenba and Charles H. Hope, Defendants. Indictment. A true bill. Geo. B. Warren, Foreman of the Grand Jury.

Presented by the Foreman of the Grand Jury, in the presence of the Grand Jury, in open Superior Court of the State of California, within and for the County of Los Angeles, and filed as a record in said Court this sixth day of May 1936. L. E. Lampton, Clerk. By E. C. Averre, Deputy Clerk. Buron Fitts, District Attorney. By Eugene D. Williams, Deputy. B. W. issued. No bail.

[fol. 2314] In Superior Court of Los Angeles County

[Title omitted]

Minute Entry—May 6, 1936

District Attorney Buron Fitts, Deputy District Attorney E. D. Williams and the Defendant Major Raymond Lisenba with his counsel, S. J. Silverman, and Defendant Charles

H. Hope without counsel, present. The Public Defender is appointed by the Court as attorney for Defendant Charles H. Hope.

Both defendants are duly arraigned, each states his true name to be as charged in the Indictment, waives reading of the Indictment and on motion of said defendants, the time to plead is continued to May 11, 1936 at 9:30 A. M.

[fol. 2315] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

MINUTE ENTRY—May 11, 1936

Deputy District Attorney A. S. Colgrove, Deputy District Attorney E. D. Williams, Defendant Major Raymond Lisenba with his counsel, S. J. Silverman and Defendant Charles H. Hope with his counsel, Deputy Public Defender William H. Sanson, present.

Each defendant regularly enters his plea of "Not Guilty as charged in the Indictment" and Defendant Major Raymond Lisenba also enters his plea of "Not Guilty by Reason of Insanity" because he was insane at the time that he is alleged to have committed the unlawful act.

Doctors Edwin Wayte, Paul E. Bowers and Ross Moore are appointed under Section 1027 Penal Code to examine Defendant Major Raymond Lisenba as to his mental condition.

The trial of the action is thereupon set for June 22, 1936 [fol. 2316] at 9:30 A. M. and transferred to Department 43, each defendant waiving the statutory period.

Defendant Major Raymond Lisenba's motion for severance is set for hearing by the Court on May 19, 1936 at 2:00 P. M.

[fol. 2317] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

ORDER DENYING MOTION FOR SEVERANCE—May 19, 1936

Deputy District Attorney E. D. Williams and Defendant with his counsel, S. J. Silverman, present.

Motion for severance is denied by the Court.

[fol. 2318] In Superior Court of Los Angeles County

[Titles omitted]

Minute Entries of Trial—Monday, June 22, 1936.

Cause is called for trial.

Deputy District Attorneys Eugene D. Williams and John Barnes, and the Defendant with his counsel, Samuel J. Silverman, R. E. Parsons and William J. Clark, present.

The Jury is in the process of impanelment. Prospective Jurors are admonished and trial is continued to June 23,1936.

[fol. 2319] Tuesday, June 23, 1936.

• • • • • • •

Trial is resumed.

Deputy District Attorneys Eugene D. Williams and John Barnes, and the Defendant with his counsel, Samuel J. Silverman, R. E. Parsons and William J. Clark, present.

The following Jurors are sworn to try the cause:

Ethel Sherman	Hollis M. Wade
Ralph May	Sherwood W. Whitcher
William Wilcox	Ollie Sype
Wiley B. Darnell	Thomas R. Webb
Frank T. Allen	Harry M. Gray
Harold W. Hart	Fred Sheridan

The following alternate Jurors are impaneled and sworn: Albert A. Gad and Samuel Gilliam.

The Indictment is read and pleas stated.

The Court orders a daily transcript of the testimony.

Fred C. Kohl is sworn and testifies on behalf of the People.

[fol. 2320] The Jury and alternates are admonished, and trial is continued to June 24, 1936.

[fol. 2321] Wednesday, July 15, 1936.

• • • • • • •

Trial is resumed.

Deputy District Attorneys Eugene Williams and John Barnes and the Defendant with his counsel, S. J. Silverman,

W. J. Clark and R. E. Parsons, present. It is stipulated the jury and alternate jurors are all in attendance.

Dr. Frank Weinberg and Lewis Berry are recalled and Major Raymond Lisenba alias Robert James is sworn and all testify on behalf of defendant.

People's Exhibits Nos. 1 (Diagram), 2 (Diagram), 3 (Note), 4 (Letter and Envelope), 5 (3 Cards-Exemplars), 6, 7, 8 and 9 (Each a Photo), 10 (Coil of Chicken Wire), 11 (Lot of Rope-Sash Cord), 12, 13 and 14 (Each a Photo), 15, 16 and 17 (Each a Blanket), 18 (Snake Venom-Cup), 19 (Box-Snake Fangs), 20 (2 Rattlesnakes), 21 (Application [fol. 2322] for Insurance), 22 (Insurance Policy), 23 (Application for Insurance), 24 (Application to Insurance), 25 and 26 (Each an Insurance Policy), 27 to 38 (Each a Photo), 39 (Diagram-Chalk), 40 to 49 (Each a Photo), 50 (Photostat of Letter), 51 (Diagram-Chalk), 52 to 56 (Each a Photo), 57 (Letter and Envelope), 58 and 59 (Hospital Records), 60 and 61 (X-Rays). 62 (Photostat.—Policy and Application), 63 and 64 (Proof of Death), 65 (Check), 66 and 67 (Application for Insurance), 68 and 69 (Policy of Insurance), 70 (Release), 71 (Policy-Photostat.), 72 (Proof of Claim-Photostat.), 73 (Reg. Card-Hotel), and 74 (Calling Card) are filed.

The Jury is admonished and trial is continued to July 16, 1936.

[fol. 2323] Thursday, July 16, 1936

* * * * * * *

Trial is resumed.

Deputy District Attorneys Eugene D. Williams and John Barnes, and the Defendant with his counsel, S. J. Silverman, W. J. Clark and R. E. Parsons, present.

It is stipulated the Jury and alternates are all present. Testimony of Major Raymond Lisenba on behalf of the defendant is resumed. Charles H. Hope is recalled by the Defendant. The following witnesses are sworn and testify on behalf of the Defendant: James DeWitt George, Scott Littleton, and Ray O'Brien. Defendant rests.

Defendant's Exhibits A (Drawing), B (Affidavit, for identification), c (Wooden Box, for identification), D (Wooden box), E (Snake's Head), F (Diagram-Skull), G (Phamphlet, for identification) and H, I and J (Each a Photo) are filed.

[fol. 2324] People's Exhibit No. 75 (Exhibit A—Civil Case No. 392270) is admitted by reference only.

Robert F. Herron, Edward Lynch and A. Pierce Artran are sworn and testify in rebuttal on behalf of the People.

The Jury is admonished and trial is continued to July 17, 193 .

[fol. 2325] Friday, July 17, 1936

* * * * * * *

Deputy District Attorneys Eugene Williams and John Barnes, Defendant Lisenba with his counsel, S. J. Silverman, R. E. Parsons and W. J. Clark, and Defendant Hope with his counsel, Deputy Public Defender E. E. Cuff, present.

On motion of Defendant Hope the pronouncing of judgment and sentence as to himself is continued to July 24, 1936.

Trial is resumed as to Defendant Lisenba.

It is stipulated that the Jury and alternates are all present.

The following persons are sworn and testify on behalf of the People in rebuttal: Doctor A. F. Wagner, Jack Southard, Carl H. Scobie and Mrs. Viola Pemberton. People rest. People's Exhibits Nos. 76 (Snake in jar), 77 (Rattlesnake), [fol. 2326] for identification, 78 (Snake in jar) for identification are filed. People rest.

Doctor Frank Weinberg is sworn and testifies on behalf of people in surrebuttal. Defendant rests.

Defendant's Exhibit K (Photographic reproduction of People's Exhibits Nos. 39 and 51) is filed.

Cause is argued, and continued to July 20, 1936. Jury is admonished and trial is continued to July 20, 1936.

[fol. 2327] In Superior Court of Los Angeles County

[Title omitted]

Verdict—July 24, 1936

Trial is resumed.

Deputy District Attorneys Eugene D. Williams and John Barnes, and defendant with his counsel, S. J. Silverman W. J. Clark and R. E. Parsons, present.

It is stipulated that the Jury and alternates are all present. The Court instructs the Jury. The Sheriff is sworn

to take charge of the Jury, which retires at 10:56 A. M. to deliberate. At 12:10 P. M. the Jury is taken to lunch with the bailiff in charge, returning at 1:30 P. M. for further deliberation. At 6:00 P. M. the Jury is taken to dinner with the bailiff in charge, returning at 7:10 P. M. for deliberation, and returning into Court at 8:10 P. M. with the following verdict:

[fol. 2328] Title of Court and Cause

"We, the Jury in the above entitled action, find the Defendant Guilty of Murder, a felony, as charged in the Indictment, and find it to be Murder of the First Degree." This 24th day of July, 1936.

F. T. Allen, Foreman.

The Jury is polled and each answers in the affirmative. Verdict and instructions are filed. Alternate jurors are excused.

The pronouncing of judgment and sentence is set for July 28, 1936, at 10:00 A. M. Defendant is remanded.

[fol. 2329] In Superior Court of Los Angeles County

[Title omitted]

Verdict—Filed July 24, 1936

We, the Jury in the above entitled action, find the Defendant guilty of Murder, a felony, as charged in the Indictment, and find it to be Murder of the First Degree. This 24th day of July, 1936.

F. T. Allen, Foreman.

[File endorsement omitted.]

[fol. 2330] In Superior Court of Los Angeles County

[Title omitted]

Minute Entry—July 28, 1936

Deputy District Attorneys Eugene D. Williams and John Barnes, Defendant Lisenba with his counsel, S. J. Silverman,

W. J. Clark and R. E. Parsons, and Defendant Charles H. Hope with his counsel, Deputy Public Defendant William B. Neeley, present.

By leave of Court Defendant Lisenba withdraws his plea of "Not Guilty by Reason of Insanity" and moves orally for a new trial. The hearing on said motion is continued to September 8, 1936, at 10:00 A. M. Defendant Lisenba is remanded.

The Court now orders the Reporter to transcribe the argument of the Deputy District Attorney, copies to be given the District Attorney and counsel for the Defendant.

No legal cause appearing why judgment should not be [fol. 2331] pronounced, the court pronounces judgment and sentence as to Defendant Hope as follows: Defendant is sentenced to the California State Prison at Folsom for the term prescribed by law. This sentence is entered in Judgment Book No. 32, Page 148.

Defendant Hope is remanded.

[fol. 2332] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

AFFIDAVIT OF R. E. PARSONS—Filed August 8, 1936

STATE OF CALIFORNIA,
County of Los Angeles, ss:

R. E. Parsons, being first duly sworn, and upon his oath, deposes and says: That he is one of the attorneys in the above entitled matter and that as such he was present during the course of the trial of the above named defendant in Department 43 of the above entitled court and that upon one occasion during the course of the trial, and while testimony was being taken, affiant heard a commotion in the rear of the court room and upon looking up saw one of the investigators of the District Attorney's office of this County, and who had been working in and upon the preparation of this case and who, from time to time had been sitting at the counsel table during the trial of this case, entering the court room with another gentleman and the two of them were carrying a box which box was approximately a foot square and about five feet long and one side was made of glass so

that upon looking into the glass one could see the entire in-[fol. 2333] side of the box, and there within the box, were two live rattlesnakes commonly known as "diamond back", and affiant could hear the rattle of these snakes, notwithstanding the proceedings within the court room were then actually being carried on, as these men entered the court room with the box containing the two live rattlesnakes.

That there was considerable commotion within the courtroom and affiant as he turned about the courtroom, saw numerous people partially arising from their seats and looking in the direction of the two men who were carrying the box of live rattlesnakes within the courtroom; that affiant could hear numerous comments made by persons within the court room which remarks were, however, made in an undertone and affiant could not tell exactly what the spectators within the courtroom said, but affiant noticed the jury, immediately upon the entering of the courtroom by the District Attorney's investigator and the other man, who were carrying the box of live rattlesnakes directed their attention from the actual proceedings then taking place within the courtroom, and the eyes of the jurors were immediately centered upon the two men who were entering the courtroom with the box of rattlesnakes; that the box of rattlesnakes was taken to a position in the courtroom immediately behind the clerk's desk and the box was set down and at a later time this same box of rattlesnakes together with the two rattlesnakes therein contained, was offered in [fol. 2334] evidence by the People over an objection of the defendant, and thereupon said box of rattlesnakes, with the glass portion thereof turned toward the jury, was placed upon the counsel table at a position approximately four or five feet from the front of the jury box, and affiant noticed that the attention of the jury was thereupon attracted to and centered upon the said live rattlesnakes which were then contained in said box and which were exhibited to the jury as aforesaid.

That during the course of the trial a letter was received eventually by affiant, as one of counsel for the defendant, from a man by the name of —— which letter was offered in evidence by defendant in support of a motion by the defendant for a continuance, this letter indicating that this man had seen the defendant and his wife, Winona, at Pike's Peak upon the day and immediately before the automobile accident upon Pikes Peak in which Winona James, a former

wife of the defendant, suffered severe injuries and which evidence of the accident was offered by the District Attorney in support of their contention that Winona James, a former wife of the defendant was murdered by the defendant, and the letter from Mr. —— was to the effect that he had seen Winona James and her husband immediately prior to the happening of the accident and that they were at that time not under the influence of intoxicating liquor.

[fol. 2335] That affiant, while in the course of the trial, came into possession of a copy of "Liberty Magaz-ne" of the date of July 25, 1936 which magazine was for sale upon the news stands of the City of Los Angeles and was offered for sale during the course of this trial at the very entrance of the Hall of Justice within which building the courtroom within which this trial was occurring, was actually situated, and it would have been necessary, and was necessary, for members of the jury as they passed to and from the building, to pass by news venders who were actually selling said issue of Liberty Magazine there and upon the cover of said magazine was the following: "The Strangest Crime Los Angeles Ever Knew—Detective Littleton tells the inside story of the Snake Man's Wife Murder".

That commencing on page 16 of the said issue of said issue of Liberty Magazine was an article headed "Death At the Lily Pond" "The Strangest Crime Los Angeles Ever Knew. Reading time 35 minutes 15 seconds. The lily pond. Beside it Mary Busch James was found lying dead." And upon page 16 of the said Liberty Magazine the following is found set up in the center of the page in large type: "The astonishing inside story of the Snake Man's Wife Murder—by One of the Detectives who 'Broke' the case—Scott Littleton Staff Investigator for the District Attorney of Los Angeles County". That the said Scott Littleton referred to was one and the same person as Scott Littleton, [fol. 2336] one of the investigators of this case who actually worked upon the preparation of this case and for the greater portion of the trial sat at the counsel table beside the District Attorney's Deputies prosecuting the defendant.

That among other things the said article recited the following: (page 20 of said Liberty Magazine) "Meanwhile we went around and around with him about the death of his wife. For nearly sixty hours we kept him awake, taking turns questioning him", this referring to the questioning of the defendant immediately after his arrest and the testi-

mony elicited from the officers upon the stand indicated that the defendant had been arrested on Sunday the 19th at about 9 or 10 A. M. and had actually been booked in the County Jail on Tuesday the 21st at about 9 to 10 A. M., being approximately 48 hours, and there was some testimony by an investigator that James slept in a chair starting at about 3 o'clock Tuesday morning, the 21st.

It would appear from the article in Liberty Magazine that James was actually "kept awake", his inquisitors taking turns questioning him for nearly 60 hours, this statement being by an investigator of the District Attorney's office of Los Angeles County who had actually worked upon the case and this statement in Liberty Magazine to the effect that the defendant James was kept awake for 60 hours was at variance with all of the testimony given by the investigators to the effect that he had been kept awak- for [fol. 2337] only 48 hours, and that then he had been permitted to sleep some.

That during the course of the trial the defendant Hope denied that he had ever discussed his proposed testimony with any person, and the article in Liberty Magaz-ne recites as follows (page 20): "I have arrested quite a few people for major felonies. Hope, I could tell, was just made to order for us. 'James certainly puts you in the middle', I said. 'He's spilled the works to us, but I'm damned if you look like that kind of a guy.' Would he take the bait? I held *by* breath. 'I had nothing to do with it', he said, with strong emphasis on the 'I'. *We had our man!*'' "You mean *he* did the whole thing?' I asked in a tone of disbelief. 'Don't give me that—you were in it right up to your neck with him.' 'I wasn't, I tell you. He did it all.'' "Snakes—and everything?'' Southard ventured (Southard was the man actually in charge of the investigation for the District Attorney). 'He told me he wanted them to fight. He told me he was going to have snake-fights and invite his friends.' 'So James *is* telling us the truth when he says you get them for him?' 'Yes,' he said, 'I got them for him but I didn't know what he was going to use them for. He had me hypnotized, I tell you!'

"'He had you cut in on the insurance,' Southard said. -Don't try to kid us. We've got the whole story.' 'I'm not. So help me God, all I did was help carry her out after [fol. 2338] she was dead. He made me do it, so help me!'

'You didn't have a thing to do with drowning her?' 'Not a thing! *He* did that, I swear to you he did!'

"A confession? Of course it was. A partial one, anyhow. The thing was to get him back to town, go to work on him, and get it all down in black and white before the newspaper storm broke. On the way we tried to get over to him the idea that the more he talked the better his chances would be of escaping the rope. By the time we reached the Hall of Justice he said he was all set to shoot the works with us.

"We bought him a meal, then joined District Attorney Fitts, Deputy District Attorney Williams, and Chief Plummer. Assistant Chief Griffen (Deputy Chief Griffen was one of the investigators who had James in custody and questioned him for many hours immediately after his arrest) and a stenographer were there and we got right down to business. At three o'clock the following morning we had dug out of Chuck Hope, ex-sailor and floor finisher, a story that Poe might have imagined."

Later on in said article, on page 21, among other things this is written by Littleton, the author of the article: " 'Did you believe that?' asked Captain Plummer (referring to a conversation with Hope). 'Of course not' said Hope. I thought he was kidding, but I was broke and almost any kind of a proposition looked good to me.'

[fol. 2339] That none of counsel for defendant had the slightest inkling that such an article had ever been written and submitted to any magazine or they would have prepared to take depositions so that the original manuscript of the article might have been presented to the Court, and affiant first learned of the existence of such an article when he saw the July 25th, 1936 copy of Liberty Magazine. That as has been indicated, there are numerous matters set forth in said story in Liberty Magazine of such a nature as to constitute important evidence to the cause of defendant and said matters as related in said article written by Scott Littleton, District Attorney's investigator, are directly opposite to sworn evidence given upon the trial of this case and it would have been, and was, and is important to the cause of the defendant that the evidence as set forth in said article submitted to the editors of Liberty Magazine, could have been presented to the Court.

That affiant talked with a great many persons during the course of the trial who reminded affiant of the existence of this story in Liberty Magazine and that they had read the

same, and it would appear that Liberty Magazine did at the time of the sale of this particular issue, have a tremendous sale within the City of Los Angeles, of many thousands of copies, and that Liberty Magazine is one of the leading national weekly magazines, widely read, and that said article so published in said magazine during the course of [fol. 2340] this trial could only have had an effect upon members of the jury prejudicial to the cause of the defendant.

R. E. Parsons.

Subscribed and sworn to before me this 8th day of August, 1936. H. Y. Gibson, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[fol. 2341] (Endorsed:) Received copy of the within Affidavit this 8th day of August 1936. Buron Fitts, D. A., by A. Schweitzer, Attorney for Plaintiff

[File endorsement omitted.]

[fol. 2342] In Superior Court of Los Angeles County

[Title omitted]

Affidavit of Wm. J. Clark—Filed August 8, 1936

State of California,
County of Los Angeles, ss.:

Wm. J. Clark, being first duly sworn, deposes and says: I am one of the attorneys for the defendant and was one of the atterneys that represented him at the trial of the above entitled cause. There was a strong public sentiment against him before the trial commenced. It was so strong that serious consideration was given to the question as to whether a motion should be made for a change of venue. When a jury was selected I suggested to Hon. Chas. W. Fricke that the jury be locked up during the trial but it was not so ordered and the jurors were not removed from contact with the public nor prevented from reading the papers except that they were admonished not to do so.

All the daily papers, of which there were four, namely, the News, the Times, the Herald and the Examiner, carried daily stories unfavorable to the defendant and each day the court room was filled with an unfriendly audience, while [fol. 2343] from twenty to sixty persons were waiting in the corridors almost throughout the trial.

There was the testimony of one Charles Hope that he had procured rattlesnakes at the solicitation of the defendant and the latter had thrust his wife's foot into a box containing one of them. As the testimony of said witness appears at length in the reporter's transcript it is not deemed necessary to quote from it here. He did say, however, that the snakes were returned to the man from whom he bought them.

On the 29th day of June the District Attorney, acting through his deputies Eugene Williams and John Barnes, committed such misconduct as inflamed the passions of the jurors against this defendant and prevented him from having a fair trial.

On said day the District Attorney, acting through his said deputies, for the purpose of inflaming the minds of the jurors, caused to be brought into the court room the said two rattlesnakes. The said snakes were in a box which was carried down the aisle of the court room, every seat of which was occupied. The snakes were alive and sounding their rattles. A wave of terror—I can find no other language more accurate—swept through the court room. Spectators rose from their seats. Some nearest the aisle shrank away. Many uttered exclamations of fright.

The scene as described by a reporter for the Herald-[fol. 2344] Express was as follows:

"Buzzing their hollow rattles so loudly that women in the crowded courtroom shivered and shuddered at the eerie, frightening sounds, two diamond-back rattlesnakes glittering in their new skins today were placed on the counsel table in Superior Charles W. Fricke's court, where Robert S. James, Birmingham barber, crouched ghost-faced and jittery at his trial for the murder of his golden-haired bride, Mary."

"Paraded across the courtroom in a velvet covered, venom splashed, 5-foot glass cage, two deadly diamond-back rattlesnakes late today hissed and shook their hollow rattles eerily, and struck out with their evil wedge-shaped heads,

as they were exhibited less than 2 feet away, before the fascinated eyes of 10 men and 2 women who make up the jury trying Robert S. James for the murder of his golden haired wife, Mary."

"The reptiles had just been identified by Snake Joe Hotenbrink as Lethal and Lightning, two guaranteed "hot" snakes he had sold to Charles H. Pope, hard talking ex-sailor, the day before Mrs. James was slain by drowning in her bathtub in her La Canada home."

The Examiner reporter gave the following description of the scene:

"Men's enemy from primordial ages, the snake, yesterday was made the living, visible symbol of the Robert James murder case. Two diamond-backed rattlesnakes hissed and [fol. 2345] struck before the trial jury as a long glass box was borne forward like a hideous offering of a black ritual."

I was standing with my face toward the jury at the time. I noticed some of them gave a kind of gasp almost at the moment I noticed the consternation of the audience. Some of the spectators, however, rose to their feet. Many of them made audible exclamations. Those nearest the aisle, shrank away. I made a protest at the time because of the obvious effect which the bringing of the snakes into the court room had upon the spectators who were there.

I am informed and believe, and therefore state the fact to be, that the bringing of the rattle snakes into the court room in the manner described had such effect upon the minds of the jurors as prevented them from giving fair consideration to the *eficence* thereafter introduced by the defendant. The source of my said information is a newspaper article containing alleged interviews with members of the jury, none of whom have publicly, or so far as I know at all, denied the statements attributed to them.

The said interviews were published in a daily newspaper of large circulation, to-wit, the Los Angeles Examiner, of July 25, 1936, and I quote from them as follows:

Harold W. Hart, one of said jurors, said:

"James had been convicted in my own mind ever since they brought the rattle snakes into the court room, showed them to us, and then introduced witnesses who told us that [fol. 2346] James had actually stuck his wife's foot into a

box containing one of those serpents and had watched it strike her."

Mrs. Ollie Sype said:

"The sight of the rattlesnakes which were exhibited as the weapons by which Robert James did his wife to death stunned me. It was the most shocking experience of my life."

Harvey M. Gray said:

"I think that jurors should be governed by the preponderance of evidence in the doctrine of reasonable doubt. So far as I am concerned, the preponderance of the evidence was all to the prosecution."

Thereafter, the District Attorney, acting through his said deputies, committed further misconduct which prevented a fair trial of the cause. I am informed and believe that on the 15th day of July, 1936, during a noon intermission, one A. Pierce Artran was present in the court room at the request of the District Attorney. He did not testify in the case and was not sworn as a witness but during the said intermission, according to my said information and belief, he opened the box containing said rattlesnakes and was holding one with a forked stick, demonstrating to those who were present the mouth and fangs of said snake, when it escaped from him and slid under a bookcase in the court room, in which there were a large number of spectators. That the said snake was loose in the court room for a considerable period of time and was not returned to its box [fol. 2347] until nearly time for court to convene. The sources of my said information are the newspaper articles of July 15, 1936, and July 16, 1936, published in the papers above referred to. I also received information from the Clerk, Mr. Arthur More, casually, that one of the snakes had been out of the box, which information was a brief affirmative reply to a hurried question on my part. I was also so informed by my associate, Mr. Russell E. Parsons, who, as I understand, was not present, and received his information from others. And I was also so informed by a Mr. O'Brien, who is employed by Mr. Parsons, and I received similar information from a number of others. I was informed by Mr. O'Brien, and others whose names I do not now recall, that persons whom they thought they

recognized as jurors passed through the court room during the time when the rattle snake was out and before the excitement which it caused had subsided.

The presence of the snakes in the court room proved nothing. They were not brought into the court room for the purpose of proving anything. There is no evidence as to one of them that it was ever in the vicinity of the deceased, Mrs. James; and there was no attempt to identify either one of them as the rattle snake which it was claimed did strike Mrs. James. The snakes were produced for the effect that two live rattle snakes—any two live rattle snakes—would have upon the jury. Any other two rattle snakes would have served the same purpose.

[fol. 2348] The District Attorney committed further misconduct which prevented a fair and impartial trial, and in particular as follows: one of the investigators for the District Attorney is, and at the times herein mentioned was, Scott Littleton; that said Scott Littleton was one of the investigators employed for the purpose of gathering evidence in connection with this case.

There is a magazine of National circulation, published at 1926 Broadway, Lincoln Square, New York, but said magazine has an extensive circulation and is sold at the news stands throughout the city of Los Angeles. That the said Scott Littleton wrote and there was published in the said magazine an article written by said Scott Littleton and purporting to state the real facts in connection with the alleged murder of the defendant's deceased wife. That the said article was so published in a number of said Liberty Magazine dated July 25, 1936, and was exposed for sale and sold at the news stands in the city of Los Angeles on and after said date and while the trial of said cause was in progress. That the said article was written in such manner, as to contain statements calculated further to inflame the public mind against the defendant, such as, "I thought I'd heard about everything in the line of sex that could come over a wire, but this was in a class by itself. The man was tireless, and perverted and sadistic to boot. For two weeks we listened, night after night, usually until [fol. 2349] about two or three in the morning, when he would send his current woman home and go to sleep."

The District Attorney committed further misconduct of such character as to prevent a fair and impartial trial, and in particular as follows:

That one of the investigators for the said District Attorney was one Jack Southard. That during the trial an alleged confession of the defendant was offered in evidence. That affiant objected to the production thereof upon the ground that it was not free and voluntary, and asked leave to introduce evidence to show its involuntary character, and such leave being granted, affiant called Jack Southard to the stand. That said Southard was a hostile witness and was known to affiant to be hostile when affiant placed him upon the stand, but affiant believed that the said Jack Southard would testify truthfully under oath. That affiant asked the said Southard if it were not true that he had struck the said defendant James while the latter was being detained in custody and before any confession had been obtained from him, to which Southard replied in effect that he had struck him in connection with the other case, meaning in connection with a charge of incest upon which this defendant had theretofore been tried.

Upon being examined by Deputy District Attorney Eugene Williams, Southard was asked what James had said immediately before he was struck, and replied in substance [fol. 2350] that he had stated to James that it was too bad that such a nice girl, so well brought up as James' wife, should have met such a death. That James replied in effect that she was not much, she was nothing but ——, and then used an opprobrious epithet in connection with her.

That affiant deemed the testimony given by Southard in response to the question of Mr. Williams utterly inconsistent with the statement he had made upon direct examination by affiant; and affiant, in the discharge of his duty to his client, felt called upon to criticise the testimony which embraced such inconsistency. In doing so, affiant moderated his criticism as much as he conceived his duty to his client would permit him to do but that said Southard became incensed, and, although he is a young and vigorous man, much larger and stronger than affiant, he approached affiant and made use of an opprobrious and offensive term stating that if affiant were younger he would use physical force upon him. That the opprobrious term was used by Southard in the immediate presence of the Deputy District Attorney, while the Judge was upon the bench, just after court had adjourned, while spectators were leaving the room, and while jurors must still have been in the corridor just outside. That by reason of the said misconduct on the

part of the District Attorney, acting by and through his said deputies and investigators, the attention of counsel for the defendant was diverted from the essential facts, [fol. 2351] and an atmosphere of terror was thrown around the court room during almost the entire period occupied by the trial, and public sentiment was so strong against the defendant that it is inconceivable that the jury, not having been locked up, expressions of hatred and resentment should have failed to reach them.

And in addition to the acts of misconduct herein set forth, affiant states that the defendant has newly discovered evidence, which could not have been produced by him by the exercise of the utmost diligence prior to the trial. That the said evidence came to the knowledge of the defendant's counsel through a letter received by them from a person at Pike's Peak, whose name was blank and whose address was furnished, and who stated that he saw the former wife of the defendant, who received injuries descending from Pike's Peak, shortly before she left the summit, and that she was sober and not under the influence of liquor, as claimed by witnesses for the prosecution. That such information was not known until the time of the trial; that it was received first by the defendant himself, who handed the letter to affiant. That affiant thereupon called the court's attention to it and that at various times through the trial, time was asked in which to take the deposition of said witness but the same was refused.

Also during said trial, counsel for the defendant learned with regard to a witness named Madge Reed; that the said [fol. 2352] witness had sent an anonymous letter to an insurance company in which the wife of defendant had been insured. That she sent further letters to the District Attorney's office; that in said letters she made statements inconsistent with the testimony given by her at the trial. That in particular she stated in such anonymous letters that the defendant had been too drunk to register at the hotel at the time that she claimed he had told her the circumstances of his wife's death and had offered her $2000 if she would testify for him in case he should ever be indicted for his wife's murder. I have no clear recollection of all the details of her testimony but *but* I have caused to be set forth below an extract from the said article by Scott Littleton which contains the information

here referred to. That the said article came to affiant's attention during the trial but that by reason of the importance of other duties devolving upon him he did not read it carefully until after Miss Reed had been excused, in fact, according to his present recollection, Miss Reed had been excused before the said magazine was published.

There is an error I wish to correct. The person who let the snake out of the box was used as a witness.

Wm. J. Clark.

Subscribed and sworn to before — this 8th day of August, 1936. Frost E. Stocksläger, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[fol. 2353] Endorsed: Received a copy of the within this 8 day of August 1936. Buron Fitts, District Atty, By A. S.

[File endorsement omitted.]

[fol. 2254] In Superior Court of Los Angeles County

[Title omitted]

Minute Entry—September 8, 1936

Deputy District Attorneys Eugene Williams and John Barnes and defendant with his counsel, R. E. Parsons and W. J. Clark by Ray O'Brien, present.

Due to the absence of counsel for defendant, on motion of defendant, the hearing on the motion for a new trial is continued to September 10, 1936, at 9:00 A. M.

[fol. 2355] In Superior Court of Los Angeles County

[Title omitted]

Minute Entry of Judgment—September 10, 1936

Deputy District Attorneys Eugene Williams and John Barnes and defendant with his counsel, W. J. Clark and R. E. Parsons, present.

Motion for new trial comes on for hearing and is denied.

No legal cause appearing why judgment should not be

pronounced, the court pronounces judgment and sentence as follows: Defendant is sentenced to the California State Prison at San Quentin to suffer death by hanging, date to be hereafter set. This sentence is entered in Judgment Book No. 32, Pages 250-A and 250-B.

The defendant announces in open Court that he appeals to the District Court of Appeal of the State of California, Second Appellate District, from the Court's order denying Defendant's motion for a new trial, from the judgment [fol. 2356] pronounced herein and the whole thereof.

Defendant is remanded.

[fol. 2357] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

COMMITMENT—Filed September 14, 1936

To the Sheriff of Los Angeles County, and to the Warden of the State Prison of the State of California at San Quentin:

Be it Remembered, that on the 6th day of May, in the year of our Lord, 1936, an Indictment was returned by the Grand Jury of the County of Los Angeles, State of California, against the above named Major Raymond Lisenba, also known as Robert S. James, which Indictment was, on the said 6th day of May, in the year of our Lord, 1936, filed in the Superior Court of the State of California, in and for the County of Los Angeles, charging the said Major Raymond Lisenba with the crime of Murder, a felony;

That thereafter, and on the said 6th day of May, in the year of our Lord, 1936, the said defendant, Major Raymond Lisenba, was duly and regularly arraigned in said Court, being then and there present and accompanied by his counsel, and requested additional time until the 11th day of [fol. 2358] May, in the year of our Lord, 1936, within which to plead; and thereafter, on the 11th day of May, in the year of our Lord, 1936, being then and there present and accompanied by his counsel, the said defendant was again duly arraigned and entered a plea of "Not Guilty" and a plea of "Not Guilty by Reason of Insanity" to said Indictment; that thereafter, on or about the 22nd day of June,

in the year of our Lord, 1936, the defendant, Major Raymond Lisenba, being then and there present and accompanied by his counsel, was placed upon trial in Department 43 of the above entitled Court upon his plea of "Not Guilty;"

A jury was duly selected, accepted and sworn, as provided by law, whereupon and whereafter evidence was adduced on behalf of the People of the State of California and on behalf of the said defendant, Major Raymond Lisenba, and closed. After arguments of counsel and instructions of law by the Court, the jury retired to deliberate upon its verdict; that thereafter, on the 24th day of July, in the year of our Lord, 1936, in the presence of said defendant and his counsel the jury returned its verdict finding the defendant, Major Raymond Lisenba, guilty of murder, and finding it to be murder of the first degree, and determining that as punishment therefor the said Major Raymond Lisenba should suffer the penalty of death; that said verdict was thereupon recorded as provided by law; and thereafter on or about the 28th day of July, in the year of our Lord, 1936, the defendant, Major Raymond [fol. 2359] Lisenba, being in court and accompanied by his counsel, formally withdrew his plea of "Not Guilty by Reason of Insanity" theretofore entered to said Indictment; and thereafter made a Motion for a New Trial and asked for time to file affidavits in support of said Motion. Thereupon at the request of defendant the Court granted him additional time to and including the 8th day of August, in the year of our Lord, 1936, within which to file such affidavits, and granted the People additional time to and including the 18th day of August, 1936, within which to file counter affidavits, and at the request of the defendant, as aforesaid, fixed the 8th day of September, in the year of our Lord, 1936, at the hour of 9:30 o'clock A. M., as the time, and Department 43 of the above entitled Court, as the place for the consideration and determination of said Motion for a New Trial.

That on the 8th day of September, in the year of our Lord, 1936, in Department 43 of the above entitled Court, the defendant being present but not accompanied by his counsel, requested a continuance for the hearing of said Motion for a New Trial and for judgment until the 10th day of September, in the year of our Lord, 1936, at the hour of 9:30 o'clock A. M., because of the absence from the

city of defendant's counsel. That said Motion was thereupon at the request of said defendant granted by the Court and the cause continued until September 10, in the year of [fol. 2360] our Lord, 1936, at the hour of 9:00 o'clock A. M., in Department 43 of said Superior Court.

That thereafter on the 10th day of September, in the year of our Lord, 1936, in Department 43 of the above entitled Court, the defendant being present and accompanied by his counsel, and the People duly represented, said Motion for a New Trial was duly presented, argued and submitted to the Court for its decision, and that said Motion was then and there duly denied by the Court; whereupon the said Major Raymond Lisenba was duly arraigned for judgment and sentence and no legal cause being shown why judgment and sentence should not be pronounced, the Court duly rendered and there was then and there duly pronounced and entered against said defendant, Major Raymond Lisenba, judgment and sentence as follows:

"It is now the judgment and sentence of this Court that for the offense of Murder in the First Degree you suffer the penalty of death, such penalty to be inflicted within the walls of the State Prison of the State of California at San Quentin, at a time to be fixed in the Warrant of Execution, and you are remanded to the custody of the Sheriff of the County of Los Angeles, State of California, to be by him, within ten days from this date, delivered into the custody of the Warden of the State Prison at San Quentin for Execution of sentence."

[fol. 2361] Now, Therefore, This is to Command You, the Sheriff of the County of Los Angeles, State of California, within ten days from this date, to deliver the said Major Raymond Lisenba into the custody of the Warden of the State Prison at San Quentin, California, for the execution of sentence;

And, Furthermore, This is to Command You, the said warden of the said Prison of the State of California, at San Quentin, to hold the said Major Raymond Lisenba within the walls of said State Prison at San Quentin, California, pending the decision upon his appeal in the above entitled case, and until further order of this Court.

In Testimony Whereof, I have hereunto set my hand as judge of the said Superior Court, and caused the seal of

said Court to be hereto affixed, this 10th day of September, in the year of our Lord, 1936.

Chas. W. Fricke, Judge of the Superior Court.

Attest: L. E. Lampton, County Clerk, by A. W. Moore, Deputy. (Seal.)

[fol. 2362] [File endorsement omitted.]

[fol. 2363] In Superior Court of Los Angeles County

[Title omitted]

Statement of Grounds of Appeal and Demand for Phonographic Transcript—Filed September 11, 1936

To the Honorable, the Superior Court of the State of California, in and for the County of Los Angeles, Honorable Charles W. Fricke, Judge Presiding:

The defendant, Major Raymond Lisenba, having appealed from the order denying defendant's motion for new trial, and the judgment of this Court entered in the above entitled matters, said judgment having been made and entered by said Court under date of September 10th, 1936, now makes application, through his counsel, William J. Clark, Esq., and R. E. Parsons, Esq., for an order under the provisions of the rules of the Judicial Council of the State of California, and of the law in such case made and provided, for the transcription of phonographic notes to be used in the presentation of said cause upon appeal and states also in general terms as required thereby, the grounds and points upon which said defendant relies upon said appeal.

[fol. 2364] Said grounds and points are as follows, to wit:

1st. Insufficiency of the Evidence to justify or sustain the verdict rendered herein.

2nd. That the Court misdirected the jury in matters of law.

3rd. That the Court erred in its decision of questions of law arising during the course of the trial, and in each and every one of said decisions arising out of objections made by the defendant to the introduction of testimony and evi-

dence offered by the prosecution where such objections were overruled.

4th. That the Court erred in its decisions of questions of law arising during the course of the trial and in each and every one of said decisions arising out of objections made by the plaintiff to the introduction of testimony and evidence by the defendant where such objections were sustained.

5th. That the verdict is contrary to law.

6th. That the Court erred in its decisions of questions of law arising during the course of the trial in its decisions on each and every objection interposed by the defendant and overruled and on each and every objection interposed by the plaintiff and sustained.

7th. That the verdict is contrary to the evidence.

8th. That the Court erred in giving each and every instruction given for the plaintiff in said cause.

[fol. 2365] 9th. That the Court erred in refusing each and every instruction offered by the defendant and refused by the Court.

10th. That the Court erred in modifying all the instructions submitted and proposed by the defendant which were modified by this Court and thereafter given to the jury.

11th. That the Court erred in denying the defendant's motion for a new trial filed herein and erred in not granting said Motion on each and every ground in said motion set forth.

12th. That the Court erred in each and every decision upon questions of law where such decision was adverse to the defendants, from the time of filing the original indictment herein up to and including the time of pronouncement of sentence herein.

13th. Misconduct of the District Attorney during the course of the trial.

14th. Misconduct of the Trial Court during the course of the trial.

15th. That the Court erred in reading to the jury, during the course of the deliberations of the jury, certain testimony which had been given during the course of the trial.

The defendant designates the whole of the phonographic notes including the argument of the District Attorney and [fol. 2366] the proceedings had at the time the jury returned into court and submitted certain questions to the Court for answer, and during which time certain testimony was read by the Court to the jury as being necessary to be transcribed so as to fairly present the points relied upon.

Wherefore, the defendant, Major Raymond Lisenba, prays this Honorable Court for its order to direct the phonographic reporter to transcribe the whole of his notes taken in any and all of the steps taken or proceedings had in the above entitled action from its inception to the finish thereof in the Superior Court whether the said steps or proceedings were herein specifically mentioned or not.

Dated this 11th day of September, 1936.

R. E. Parsons and William J. Clark, by R. E. Parsons,
Attorneys for Defendant.

Let the transcript be prepared as prayed for above.

Dated September 11, 1936.

Chas. W. Fricke, Judge of the Superior Court.

[fol. 2367] [File endorsement omitted.]

[fol. 2368] In Superior Court of Los Angeles County

[Title omitted]

Certificate of Probable Cause—Filed September 11, 1936

The Court having heretofore pronounced judgment of conviction of murder in the first degree upon said defendant, by which judgment it is substantially provided that he be taken to the State Prison at San Quentin and there, at a date to be fixed hereafter, hanged by the neck until dead,

And the said defendant having duly given notice of appeal from said judgment of conviction,

And it appearing to the court that there is probable cause for said appeal, and that the same presents questions of law proper for the consideration of the Supreme Court,

It Is Hereby Ordered that execution of said judgment and of each and every part thereof, be stayed pending the determination of said appeal and that the said defendant

be retained in custody at the County Jail of said Los Angeles County by the Sheriff thereof until the further order of this Court.

Chas. W. Fricke, Judge of the said Superior Court.

[fol. 2369] [File endorsement omitted.]

[fols. 2370-2371] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 2372-2379] Service of the within and receipt of a copy hereby admitted this 30th day of September, 1936.

Buron Fitts, District Attorney, by F. R. Cummings, Chief Clerk, Counsel for Plaintiff and Respondent.

Due service of the within and receipt of a copy hereby admitted this 30th day of September, 1936.

R. E. Parsons, of Counsel for Defendant and Appellant.

Due service of the within and receipt of a copy hereby admitted this 30 day of September, 1936.

U. S. Webb, Attorney General, by Frank Richards, Deputy.

[fols. 2380-2384] In Supreme Court of California

In Bank

Crim. No. 4068

People

vs.

Lisenba (James)

Order Vacating Judgment—Filed April 20, 1939

Upon petition for rehearing, the judgment of the court, heretofore entered herein, is hereby vacated and set aside.

Dated: April 20, 1939.

Seawell, Acting Chief Justice, Curtis, Justice, Langdon, Justice, Houser, Justice.

[File endorsement omitted.]

[fol. 2385] [File endorsement omitted.]

[fol. 2386] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PETITION FOR REHEARING—Filed October 25, 1939

To the Honorable Justices of the Supreme Court of the State of California:

Your Appellant most respectfully petitions for rehearing of the decision rendered upon rehearing of the cause, and for a reconsideration of the entire cause, and for a reference back for the taking of further evidence in the light of new developments since the cause was heretofore submitted on new and different grounds than those heretofore submitted, namely:

That the Trial of the Cause and the Proceedings Had were in Violation of the Fourteenth Amendment to the Constitution of the United States and the Due Process Clause of Article I, Section 13 of the Constitution of California.

We respectfully show in respect thereto:

I

That the Bringing of Live, Hissing Rattlesnakes into a [fol. 2387] Courtroom and Exhibiting Them to a Jury was so Inflammatory and Frightening in its Nature as to make of the Trial a Mock and Sham and Violate the Fundamental Guarantee of Due Process of Law Guaranteed by the Fourteenth Amendment to the Constitution of the United States (as well as the same Provisions Contained in Article I, Section 13 of the Constitution of California.

II

That Third Degree Brutal Methods were Used upon the Defendant Lisenba (Robert S. James) to Coerce and Extort a Purported Confession, and that the Use in Evidence of such Alleged Confession Obtained by such Means and Methods Make Void the Entire Trial under the Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States.

III

That Prolonged Questioning Without Sleep and under Tortuous Mental Ordeal, Similar to that Employed in the Dark Ages, and in the Torture Chamber, were Used upon the Defendant, and Statements thus Extorted and coerced were permitted in Evidence in the Trial. That the use of the Alleged Confession in Evidence Obtained by These Methods was in Violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

IV

That the Principal Evidence Against the Defendant was that of an Alleged Accomplice named Charles H. Hope. That since the Trial the said Charles H. Hope has made [fol. 2388] Affidavits and Filed the same in the Superior Court of Los Angeles County, Stating that his testimony was obtained by Deceit, Fraud, Collusion and Coercion and was Entirely False; that He was Impelled by Force and Fear, Threats and Promises and that all these Facts, Including the Falsity of his Statements, were known to the Prosecution and Participated in by them. That Testimony thus Obtained and the Conviction Based thereon Make a Trial a Mere Pretense and are all in Violation of the Due Process of Law, Guaranteed by the Fourteenth Amendment *of* the Constitution of the United States.

V

That Alleged Evidence of Another Purported Offense in Another State was Presented in the Trial of this Case, Without any Indictment, Information or Judgment thereon and without any Jurisdiction of the California Court of the Subject Matter therein, and that said use of said Testimony Placed the Defendant upon Trial in California before a California Jury on such Purported Offense, and is in Violation of Due Process of Law, Guaranteed by the Fourteenth Amendment to the Constitution of the United States.

VI

That Major Raymond Lisenba was Unlawfully Imprisoned, and Isolated in a Private Building for Three Nights and Days, before being Lodged in any Jail: That he was then Held Practically Incommunicado for Eleven Days,

and almost Incessantly Questioned by Officers until the [fol. 2389] Alleged Confession was Given, and that the use thereof in Evidence in the Trial was in Violation of Due Process of the Law Guaranteed by the Fourteenth Amendment to the Constitution of the United States.

VII

That the Repeated Taking of Defendant Lisenba from Jail without his Attorney and Against his Consent and to the Office of the District Attorney and Other Places and after Prolonged Questioning without Food and without rest and thereafter Extorting a Purported Confession which was used in the Case against Appellant was in Violation of Due Process of Law Guaranteed by the Fourteenth Amendment to the Constitution of the United States.

[fol. 2390] I

That the Bringing of Live, Hissing Rattlesnakes into a Courtroom and Exhibiting them to a Jury was so Inflam-atory and Frightening in its Nature as to make of the Trial a Mock and Sham and Violate the Fundamental Guarantee of Due Process of Law Guaranteed by the Fourteenth Amendment to the Constitution of the United States (as well as the same Provision Contained in Article I, Section 13 of the Constitution of California.

The Fourteenth Amendment to the Constitution of the United States provides as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws."

"Due process of law refers to the law of the land "exerted within the limits of those *fundamental* principles of liberty and justice which lie at the base of all our civil and political institutions." Hurtado v. California, 110 U. S. 535; 28 L. Ed. 232.

[fol. 2391] Mr. Webster, in Dartmouth College v. Woodward, 4 Wheat. 518; 4 L. Ed. 629, defined due process of law as the law of the land—"A law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

The meaning of rendering judgment only after trial must be read to mean "fair trial."

For it is said in ex parte Nelson, 251 Mo. 63, that "these constitutional provisions are but different modes of expressing the fundamental right of man to a fair and impartial trial, be he innocent or be he guilty."

And in Moore v. Dempsey, 261 U. S. 86; 67 L. Ed. 543, the United States Supreme Court said that a trial for murder in a State Court which was hurried to conviction by mob domination was without due process of law and absolutely void.

Can it be said that a trial is fair and in accordance with Due Process of Law, guaranteed by the Fourteenth Amendment to the Constitution of the United States, when live, hissing rattlesnakes are brought into the courtroom and exhibited to the jury?

This Court must take judicial notice of the effect of rattlesnakes, of the fear and fright they create in any human being. Courts take judicial notice of matters of common knowledge (16 C. J. 512) and of the effect of phys-ological facts (16 C. J. 514) and certainly the frightening effect of a rattlesnake is well known to everyone.

[fol. 2392] Assume that this were a civil case involving damages growing out of a snake bite. Would this or any court permit the bringing in of rattlesnakes to exhibit to the jury? And if a high verdict was rendered would this court not reject it as being the result of passion and prejudice engendered by the unfair bringing in of rattlesnakes into the courtroom—such unfairness as to vitiate the verdict because it was not compatable with those fundamental concepts of due process of law guaranteed by the law of the land, the Fourteenth Amendment to the Constitution of the United States.

And where the jury is frightened into a verdict by rattlesnakes in the Courtroom and under such passion and prejudice brings in its supreme verdict, the taking of the life of a fellow human being, can it be said that such a trial under such circumstances is not a violation of due process

of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

We respectfully submit that it was unnecessary to bring these live, venomous vipers into the courtroom, that their use was only for the purpose of inflaming the jury, and bringing about a verdict from passion and prejudice. That such a verdict is one similar to mob rule and not one that results from law exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions; it is not such law as accords a fair and impartial trial to man in accordance with fundamental rights. It is not due process, guaranteed [fol. 2393] by our Fourteenth Amendment to our Federal Constitution. A jury frightened or inflamed into a verdict by two rattlesnakes is no different than a jury frightened or inflamed into a verdict by a mob. The entire proceedings became coram non judice because of reptile domination. They became void under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Just what happened in the courtroom when the rattlesnakes were brought in is best shown by two affidavits filed by Attorneys R. E. Parsons and William J. Clark (Cl. Tr. 160-182) on motion for new trial. The pertinent portions of the affidavits relating to the bringing in of snakes in the courtroom are as follows:

"In the Superior Court of the State of California in and for the County of Los Angeles

No. 64218

People of the State of California, Plaintiff,

vs.

Major Raymond Lisenba, Defendant.

Affidavit

State of California,
County of Los Angeles, ss.

R. E. Parsons, being first duly sworn, and upon his oath, deposes and says: That he is one of the attorneys in the above entitled matter and that as such he was present

[fol. 2394] during the course of the trial of the above named defendant in Department 43 of the above entitled court and that upon one occasion during the course of the trial, and while testimony was being taken, affiant heard a commotion in the rear of the courtroom and upon looking up saw one of the investigators of the District Attorney's office of this County, and who had been working in and upon the preparation of this case and who, from time to time had been sitting at the counsel table during the trial of this case, entering the court room with another gentleman and the two of them were carrying a box which box was approximately a foot square and about five feet long and one side was made of glass so that upon looking into the glass one could see the entire inside of the box, and there within the box, were two live rattlesnakes commonly known as "diamond back", and affiant could hear the rattle of these snakes, notwithstanding the proceedings within the court room were then actually being carried on as these men entered the court room with the box containing the two live rattlesnakes.

That there was considerable commotion within the courtroom and affiant as he turned about the courtroom, saw numerous people partially arising from their seats and looking in the direction of the two men who were carrying the box of live rattlesnakes within the courtroom; that affiant could hear numerous comments made by persons within the court room which remarks were, however, made in an [fol. 2395] undertone and affiant could not tell exactly what the spectators within the courtroom said, but affiant noticed the jury, immediately upon the entering of the courtroom by the District Attorney's investigator and the other man, who were carrying the box of live rattlesnakes directed their attention from the actual proceedings then taking place within the courtroom, and the eyes of the jurors were immediately centered upon the two men who were entering the courtroom with the box of rattlesnakes; that the box of rattlesnakes was taken to a position in the courtroom immediately behind the clerk's desk and the box was set down and at a later time this same box of rattlesnakes together with the two rattlesnakes therein contained, was offered in evidence by the People over an objection of the defendant, and thereupon said box of rattlesnakes, with the glass portion thereof turned toward the jury, was placed

upon the counsel table at a position approximately four or five feet from the front of the jury box, and affiant noticed that the attention of the jury was thereupon attracted to and centered upon the said live rattlesnakes which were then contained in said box and which were exhibited to the jury as aforesaid.

That during the course of the trial a letter was received eventually by affiant, as one of counsel for the defendant, from a man by the name of —— which letter was offered in [fol. 2396] evidence by defendant in support of a motion by the defendant for a continuance, this letter indicating that this man had seen the defendant and his wife, Winona, at Pike's Peak upon the day and immediately before the automobile accident upon Pike's Peak in which Winona James, a former wife of the defendant, suffered severe injuries and which evidence of the accident was offered by the District Attorney in support of their contention that Winona James, a former wife of the defendant was murdered by the defendant, and the letter from Mr.—— was to the effect that he had seen Winona James and her husband immediately prior to the happening of the accident and that they were at that time not under the influence of intoxicating liquor.

That affiant, while in the course of the trial, came into possession of a copy of "Liberty Magazine" of the date of July 25, 1936 which magazine was for sale upon the news stands of the City of Los Angeles and was offered for sale during the course of this trial at the very entrance of the Hall of Justice within which building the courtroom within which this trial was occurring, was actually situated, and it would have been necessary, and was necessary, for members of the jury as they passed to and from the building, to pass by news venders who were actually selling said issue of Liberty Magazine there and upon the cover of said magazine was the following: "The strangest Crime Los Angeles Ever Knew—Detective Littleton tells the inside story of the Snake Man's Wife Murder."

[fol. 2397] That commencing on page 16 of the said issue of said issue of Liberty Magazine was an article headed "Death at the Lily Pond" "The Strangest Crime Los Angeles Ever Knew. Reading time 35 minutes 15 seconds. The lily pond. Beside it Mary Busch James was found lying dead." And upon page 16 of the said Liberty Magazine the following is found set up in the center of the page

in large type: "The astonishing inside story of the Snake Man's Wife Murder—by One of the Detectives who 'Broke' the case—Scott Littleton Staff Investigator for the District Attorney of Los Angeles County". That the said Scott Littleton referred to was one and the same person as Scott Littleton, one of the investigators of this case who actually worked upon the preparation of this case and for the greater portion of the trial sat at the counsel table beside the District Attorney's Deputies prosecuting the defendant.

That among other things the said article recited the following: (page 20 of said Liberty Magazine) "Meanwhile we went around and around with him about the death of his wife. For nearly sixty hours we kept him awake, taking turns questioning him", this referring to the questioning of the defendant immediately after his arrest and the testimony elicited from the officers upon the stand indicated that the defendant had been arrested on Sunday the 19th at about 9 or 10 A. M. and had actually been booked in the County Jail on Tuesday the 21st at about 9 to 10 A.M. being approximately 48 hours, and there was some testi- [fol. 2398] mony by an investigator that James slept in a chair starting at about 3 o'clock Tuesday morning, the 21st.

It would appear from the article in Liberty Magazine that James was actually "kept awake", his inquisitors taking turns questioning him for nearly 60 hours, this statement being by an investigator of the District Attorney's Office of Los Angeles County who had actually worked upon the case and this statement in Liberty Magazine to the effect that the defendant James was kept awake for 60 hours was at variance with all of the testimony given by the investigators to the effect that he had been kept awake for only 48 hours, and that then he had been permitted to sleep some.

That during the course of the trial the defendant Hope denied that he had ever discussed his proposed testimony with any person, and the article in Liberty Magazine recites as follows (page 20): "I have arrested quite a few people for major felonies. Hope, I could tell, was just made to order for us. 'James certainly puts you in the middle', I said. 'He's spilled the works to us, but I'm damned if you look like that kind of a guy.' Would he take the bait? I held my breath. "I had nothing to do with it," he said,

with strong emphasis on the 'I'. We had our man!" "You mean he did the whole thing?' I asked in a tone of disbelief. 'Don't give me that—you were in it right up to your neck with him'. 'I wasn't, I tell you. He did it all." "Snakes—and everything?" Southard ventured (Southard [fol. 2399] was the man actually in charge of the investigation for the District Attorney). 'He told me he wanted them to fight. He told me he was going to have snake-fights and invite his friends'. 'So James is telling us the truth when he says you got them for him?" 'Yes,' he said, 'I got them for him but I didn't know what he was going to use them for. He had me hypnotized, I tell you!'

" 'He had you cut in on the insurance,' Southard said, Don't try to kid us. We've got the whole story.' 'I'm not. So help me God, all I did was help carry her out after she was dead. He made me do it, so help me!' 'You didn't have a thing to do with drowning her?' 'Not a thing! He did th t, I swear to you he did!'

"A confession? Of course it was. A partial one, anyhow. The thing was to get him back to town, go to work on him, and get it all down in black and white before the newspaper storm broke. On the way we tried to get over to him the idea that the more he talked the better his chances would be of escaping the rope. By the time we reached the Hall of Justice he said he was all set to shoot the works with us.

"We bought him a meal, then joined District Attorney Fitts, Deputy District Attorney Williams, and Chief Plummer. Assistant Chief Griffen (Deputy Chief Griffen was one of the investigators who had James in custody and questioned him for many hours immediately after his ar- [fol. 2400] rest) and a stenographer were there and we got right down to business. At three o'clock the following morning we had dug out of Chuck Hope, ex-sailor and floor finisher, a story that Poe might have imagined."

Later on in said article, on page 21, among other things this is written by Littleton, the author of the article: "Did you believe that?' asked Captain Plummer (referring to a conversation with Hope). 'Of course not' said Hope. I thought he was kidding, but I was broke and almost any kind of a proposition looked good to me.'

That none of counsel for defendant had the slightest inkling that such an article had ever been written and

submitted to any magazine or they would have prepared to take depositions so that the original manuscript of the article might have been presented to the Court, and affiant first learned of the existence of such an article when he saw the July 25th, 1936 copy of Liberty Magazine. That as has been indicated, there are numerous matters set forth in said story in Liberty Magazine of such a nature as to constitute important evidence to the cause of defendant and said matters as related in said article written by Scott Littleton, District Attorney's investigator, are directly opposite to sworn evidence given upon the trial of this case and it would have been, and was, and is important to the cause of the defendant that the evidence as set forth in said article submitted to the editors of Liberty Maga-
[fol. 2401] zine, could have been presented to the Court.

That affiant talked with a great many persons during the course of the trial who reminded affiant of the existence of this story in Liberty Magazine and that they had read the same, and it would appear that Liberty Magazine did at the time of the sale of this particular issue, have a tremendous sale within the City of Los Angeles, of many thousands of copies, and that Liberty Magazine is one of the leading national weekly magazines, widely read, and that said article so published in said magazine during the course of this trial could only have had an effect upon members of the jury prejudicial to the cause of the defendant.

R. E. Parsons.

Subscribed and sworn to before me this 8th day of August, 1936. H. Y. Gibson, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[fol. 2402] [Endorsed:] No. 64218. In the Superior Court of the State of California, in and for the County of Los Angeles. People of the State of California, Plaintiff, vs. Major Raymond Lisenba, Defendant. Affidavit in Support of Motion for New Trial. Received Copy of the within Affidavit this 8th day of August, 1936. Buron Fitts, D. A., by A. Schweitzer, Attorney for Plaintiff. Filed 1936, Aug. 8 A. M. 11:49. L. E. Lampton, County Clerk, by Harry Lieb, Deputy.

[fol. 2403] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

No. 64218

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

MAJOR LISENBA, also known as ROBERT S. JAMES, Defendant

Affidavit of Wm. J. Clark

STATE OF CALIFORNIA,
County of Los Angeles, ss:

WM. J. CLARK, being first duly sworn, deposes and says: I am one of the attorneys for the defendant and was one of the attorneys that represented him at the trial of the above entitled cause. There was a strong public sentiment against him before the trial commenced. It was so strong that serious consideration was given to the question as to whether a motion should be made for a change of venue. When a jury was selected I suggested to Hon. Chas. W. Fricke that the jury be locked up during the trial but it was not so ordered and the jurors were not removed from contact with the public nor prevented from reading the papers except that they were admonished not to do so.

All the daily papers, of which there were four, namely, the News, the Times, the Herald and the Examiner, carried daily stories unfavorable to the defendant and each day the court room was filled with an unfriendly audience, while [fol. 2404] from twenty to sixty persons were waiting in the corridors almost throughout the trial.

There was the testimony of one Charles Hope that he had procured rattlesnakes at the solicitation of the defendant and the latter had thrust his wife's foot into a box containing one of them. As the testimony of said witness appears at length in the reporter's transcript it is not deemed necessary to quote from it here. He did say, however, that the snakes were returned to the men from whom he bought them.

On the 29th day of June the District Attorney, acting through his deputies Eugene Williams and John Barnes, committed such misconduct as inflamed the passions of the jurors against this defendant and prevented him from having a fair trial.

On said day the District Attorney, acting through his said deputies, for the purpose of inflaming the minds of the jurors, caused to be brought into the court room the said two rattlesnakes. The said snakes were in a box which was carried down the aisle of the court room, every seat of which was occupied. The snakes were alive and sounding their rattles. A wave of terror—I can find no other language more accurate—swept through the court room. Spectators rose from their seats. Some nearest the aisle shrank away. Many uttered exclamations of fright.

The scene as described by a reporter of the Herald-[fol. 2405] Express was as follows:

"Buzzing their hollow rattles so loudly that women in the crowded courtroom shivered and shuddered at the eerie, frightening sounds, two diamond-back rattlesnakes glittering in their new skins today were placed on the counsel table in Superior Charles W. Fricke's court, where Robert S. James, Birmingham barber, crouched ghost-faced and jittery at his trial for the murder of his golden-haired bride, Mary."

"Paraded across the courtroom in a velvet covered, venom splashed. 5-foot glass cage, two deadly diamond-back rattlesnakes late today hissed and shook their hollow rattles eerily, and struck out with their evil wedge-shaped heads, as they were exhibited less than 2 feet away, before the fascinated eyes of 10 men and 2 women who made up the jury trying Robert S. James for the murder of his golden haired wife, Mary."

"The reptiles had just been identified by Snake Joe Hotenbrink as Lethal and Lightning, two guaranteed "hot" snakes he had sold to Charles H. Hope, hard talking ex-sailor, the day before Mrs. James was slain by drowning in her bathtub in her La Canada home."

The Examiner reporter gave the following description of the scene:

"Men's enemy from primordial ages, the snake, yesterday was made the living, visible symbol of the Robert James murder case. The diamond-backed rattlesnakes hissed and [fol. 2406] struck before the trial jury as a long glass box was borne forward like a hideous offering of a black ritual."

I was standing with my face toward the jury at the time. I noticed some of them gave a kind of gasp almost at the

moment I noticed the consternation of the audience. Some of the spectators, however, rose to their feet. Many of them made audible exclamations. Those nearest the aisle, shrank away. I made a protest at the time because of the obvious effect which the bringing of the snakes into the court room had upon the spectators who were there.

I am informed and believe, and therefore state the fact to be, that the bringing of the rattlesnakes into the court room in the manner described had such effect upon the minds of the jurors as prevented them from giving fair consideration to the evidence thereafter introduced by the defendant. The source of my said information is a newspaper article containing alleged interviews with members of the jury, none of whom have publicly, or so far as I know at all, denied the statements attributed to them.

The said interviews were published in a daily newspaper of large circulation, to-wit: the Los Angeles Examiner, of July 25, 1936, and I quote from them as follows:

Harold W. Hart, one of said jurors, said:

"James had been convicted in my own mind ever since they brought the rattle snakes into the court room, showed them to us, and then introduced witnesses who told us that [fol. 2407] James had actually stuck his wife's foot into a box containing one of those serpents and had watched it strike her."

Mrs. Ollie Sype said:

"The sight of the rattlesnakes which were exhibited as the weapons by which Robert James did his wife to death stunned me. It was the most shocking experience of my life."

Harvey M. Gray said:

"I think that jurors should be governed by the preponderance of evidence in the doctrine of reasonable doubt. So far as I am concerned, the preponderance of the evidence was all to the prosecution."

Thereafter, the District Attorney, acting through his said deputies, committed further misconduct which prevented a fair trial of the cause. I am informed and believe that on the 15th day of July, 1936, during a noon intermission, one A. Pierce Artran was present in the court room at the

request of the District Attorney. He did not testify in the case and was not sworn as a witness but during the said intermission, according to my said information and belief, he opened the box containing said rattlesnakes and was holding one with a forked stick, demonstrating to those who were present the mouth and fangs of said snake, when it escaped from him and slid under a bookcase in the court room, in which there were a large number of spectators. That the said snake was loose in the court room for a considerable period of time and was not returned to its box until [fol. 2408] nearly time for court to convene. The sources of my said information are the newspaper articles of July 15, 1936, and July 16, 1936, published in the papers above referred to. I also received information from the Clerk, Mr. Arthur More, casually, that one of the snakes had been out of the box, which information was a brief affirmative reply to a hurried question on my part. I was also so informed by my associate, Mr. Russell E. Parsons, who, as I understand, was not present, and received his information from others. And I was also so informed by a Mr. O'Brien, who is employed by Mr. Parsons, and I received similar information from a number of others. I was informed by Mr. O'Brien, and others whose names I do not now recall, that persons whom they thought they recognized as jurors passed through the court room during the time when the rattle snake was out and before the excitement which it caused had subsided.

The presence of the snakes in the court room proved nothing. They were not brought into the court room for the purpose of proving anything. There is no evidence as to one of them that it was ever in the vicinity of the deceased, Mrs. James; and there was no attempt to identify either one of them as the rattle snake which it was claimed did strike Mrs. James. The snakes were produced for the effect that two live rattle snakes—any two live rattle snakes—would have upon the jury. Any other two rattle snakes would have served the same purpose.

[fol. 2409] The District Attorney committed further misconduct which prevented a fair and impartial trial, and in particular as follows: one of the investigators for the District Attorney is, and at the times herein mentioned was, Scott Littleton; that said Scott Littleton was one of the investigators employed for the purpose of gathering evidence in connection with this case.

There is a magazine of national circulation, published at 1926 Broadway, Lincoln Square, New York, but said magazine has an extensive circulation and is sold at the news stands throughout the city of Los Angeles. That the said Scott Littleton wrote and there was published in the said magazine an article written by said Scott Littleton and purporting to state the real facts in connection with the alleged murder of the defendant's deceased wife. That the said article was so published in a number of said Liberty Magazine dated July 25, 1936, and was exposed for sale and sold at the news stands in the city of Los Angeles on and after said date and while the trial of said cause was in progress. That the said article was written in such manner as to contain statements calculated further to inflame the public mind against the defendant, such as, "I thought I'd heard about everything in the line of sex that could come over a wire, but this was in a class by itself. The man was tireless, and perverted and sadistic to boot. For two weeks we listened, night after night, usually until about two or three in the [fol. 2410] morning, when he would send his current woman home and go to sleep."

The District Attorney committed further misconduct of such character as to prevent a fair and impartial trial, and in particular as follows:

That one of the investigators for the said District Attorney was one Jack Southard. That during the trial an alleged confession of the defendant was offered in evidence. That affiant objected to the production thereof upon the ground that it was not free and voluntary, and asked leave to introduce evidence to show its involuntary character, and such leave being granted, affiant called Jack Southard to the stand. That said Southard was a hostile witness and was known to affiant to be hostile when affiant placed him upon the stand, but affiant believed that the said Jack Southard would testify truthfully under oath. That affiant asked the said Southard if it were not true that he had struck the said defendant James while the latter was being detained in custody and before any confession had been obtained from him, to which Southard replied in effect that he had struck him in connection with the other case, meaning in connection with a charge of incest upon which this defendant had theretofore been tried.

Upon being examined by Deputy District Attorney Eugene Williams, Southard was asked what James had said

immediately before he was struck, and replied in substance [fol. 2411] that he had stated to James that it was too bad that such a nice girl, so well brought up as James' wife, should have met such a death. That James replied in effect that she was not much, she was nothing but ————, and then used an *a*pprobrious epithet in connection with her.

That affiant deemed the testimony given by Southard in response to the question of Mr. Williams utterly inconsistent with the statement he had made upon direct examination by affiant; and affiant, in the discharge of his duty to his client, felt called upon to criticise the testimony which embraced such inconsistency. In doing so, affiant moderated his criticism as much as he conceived his duty to his client would permit him to do but that said Southard became incensed, and, although he is a young and vigorous man, much larger and stronger than affiant, he approached affiant and made use of an *a*pprobrious and offensive term stating that if affiant were younger he would use physical force upon him. That the *a*pprobrious term was used by Southard in the immediate presence of the Deputy District Attorney, while the Judge was upon the bench, just after court had adjourned, while spectators were leaving the room, and while jurors must still have been in the corridor just outside. That by reason of the said misconduct on the part of the District Attorney, acting by and through his said deputies and investigators, the attention of counsel for the defendant was diverted from the essential facts, and an [fol. 2412] atmosphere of terror was thrown around the court room during almost the entire period occupied by the trial, and public sentiment was so strong against the defendant that it is inconceivable that the jury, not having been locked up, expressions of hatred and resentment should have failed to reach them."

[fol. 2413] An affidavit in opposition was filed by Deputy District Attorney Eugene Williams. His affidavit admits the bringing into the courtroom of the snakes, but denies the effect of them. Judicial knowledge compels the necessary conclusion that the effect of snakes was as described in the affidavits above quoted.

Since this trial, R. E. Parsons has been made a deputy District Attorney in the office of the Los Angeles District Attorney. Mr. Clark was for many years a Deputy District Attorney.

We respectfully submit, therefore, that the admitted

bringing in of snakes into the courtroom and exhibiting them to the jury violated Due Process of Law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and in the light of this fundamental law, we respectfully submit, requires the granting of a rehearing and consideration of the case in the light of this law of the land, which hears fairly before it condemns, and which renders judgment only after fair trial by a jury unbitten by the fright occasioned by rattlesnake venom.

II

That Third Degree Brutal Methods Were Used Upon the Defendant Lisenba (Robert S. James) to Coerce and Ext t a Purported Confession, and That the Use in Evidence of Such Alleged Confession Obtained by Such Means and Methods Make Void the Entire Trial Under the Due [fol. 2414] Process Clause of the Fourteenth Amendment to the Constitution of the United States.

In Brown v. Miss., 297 U. S. 278, Mr. Chief Justice Hughes, in reversing the case of a man convicted of murder upon confessions shown to have been extorted by officers of the State by brutality and violence, held that such convictions based upon such confessions are void under the due process clause of the Fourteenth Amendment. The Chief Justice said: (P. 285)

"* * * But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. Moore v. Dempsey, 261 U. S. 86, 91. The State may not deny to the accused the aid of counsel. Powell v. Alabama, 287 U. S. 45. Nor may a State, through the action of its officers, contrive a conviction through the pretense of a trial which in truth is "but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testi- [fol. 2415] mony known to be perjured." Mooney v. Holo-

han, 294 U. S. 103, 112. And the trial equally is mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause required "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Hebert v. Louisiana, 272 U. S. 312, 316. It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

2. It is in this view that the further contention of the State must be considered. That contention rests upon the failure of counsel for the accused, who had objected to the admissibility of the confessions, to move for their exclusion after they had been introduced and the fact of coercion had been proved. It is a contention which proceeds upon a misconception of the nature of petitioners' complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. Moore v. Dempsey, supra. We are not concerned with a mere question of state practice, or whether counsel assigned to [fol. 2416] petitioners were competent or mistakenly assumed that their first objections were sufficient. In an earlier case the Supreme Court of the State had recognized the duty of the court to supply corrective process where due process of law had been denied. In Fisher v. State, 145 Miss. 116, 134; 110 So. 361, 365, the court said: "Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief inequity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The constitution recognized the evils that lay behind these practices and prohibited them in this country. * * * The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective."

In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, [fol. 2417] and the proceeding thus vitiated could be challenged in any appropriate manner. Mooney v. Holohan, supra."

The methods used in extorting and coercing an alleged confession from the defendant are told by James himself. (Rep. Tr. 1130-1153)

"Direct examination.

"By Mr. Clark:

Q. Mr. James, you were taken into custody, I believe, by investigators of the District Attorney's office on the 19th of April of this year. That is correct, isn't it?

A. Yes.

Q. And did you have any hernia or rupture at that time?

A. I did not.

Q. Have you now?

A. Yes.

Q. When did you become ruptured?

A. The night of the 21st of April, I believe.

Q. Where were you when you became ruptured?

A. I was on La Salle Avenue next door to the home where I lived.

Q. How did you become ruptured?

A. A long terrific beating that I was taking from Jack Southard and Charlie Griffen.

Q. Had anything been said to you by them or either of [fol. 2418] them before the beating commenced?

A. Yes.

Q. About what time did they commence beating you?

A. Well, they started Monday night, I think, about 10 o'clock.

Q. And about what time did they take you into custody?

A. Sunday morning about 9 o'clock.

Q. Now, state whether or not, after taking you into custody, they interrogated you or questioned you in regard to your wife's death?

A. That was the first thing they asked me.

Q. Who first spoke about it to you?

A. Williams did.

Q. You mean Mr. Eugene Williams, the Deputy District Attorney?

A. Yes, sir.

Q. Where were you when he spoke about it?

A. I was in my own home on La Salle Street.

Q. And who else was present at that time?

A. Well, I think every officer that I ever saw around there was there.

Q. You don't know who they were?

A. There looked like there were 13 or 14 of them.

Q. Well, how long was it after you were taken into custody until you were taken over to the other house?

A. I think about an hour.

Q. And did anyone say anything to you there about your [fol. 2419] wife's death.

A. That is about all they did say anything about.

Q. Well, do you remember when they—do you remember any time when you were shown any dictaphones?

A. Yes, sir.

Q. Do you remember anything that was said about your wife's death at that time?

A. Yes, sir.

Q. Who was the speaker?

A. Southard and Charlie Griffen.

Q. What was the statement at that time?

A. They told me that I might as well confess to my wife's murder, that they had the case on me and that they overheard my conversations in regard to my wife's death.

Q. As near as you can remember is that all that they said then?

A. Well, they said so many things that I cannot remember all that they said.

Q. By the way, at the time they made the arrest, was Mr. Silverman present?

A. No.

Q. Was any person representing you present?

A. No.

Q. After taking you to the house, where this first conversation occurred, where did they next take you?

A. They took me to the District Attorney's office.

[fol. 2420] Q. About how far was the place where you lived from the District Attorney's office?

A. Well, I wouldn't know how far to say, but out on La Salle avenue.

Q. I beg your pardon?

A. I wouldn't just say how far it is.

Q. Couldn't you give us an idea.

Mr. Williams: We can stipulate about 7 miles.

Mr. Clark: About 7 miles.

Q. How were you conveyed to the District Attorney's office?

A. I think they took me in the police car.

Q. Who rode with you, if you know?

A. I don't remember the officers that rode with me, now.

Q. Well, was anything said to you concerning your wife's death, while you were riding?

A. I don't remember.

Q. Well, didn't—I withdraw that. When you reached the District Attorney's office, were you taken to Mr. Fitts' room directly, or to some other part of the building?

A. I was taken back to the Bureau of Investigation.

Q. How long were you kept there?

A. Well, it seemed to me I was kept there two or three hours.

Q. Do you know who was there with you, if anyone?

A. Well, there were several officers there. I think Mr. Littleton was there and I think a man that operated the [fol. 2421] dictaphone was there and there was another man there at two or three different times.

Q. Now, was anything said to you while you were there?

A. No, they didn't talk to me much while I was there.

Q. And after being in the Bureau of Investigation some time, you were taken to Mr. Fitts' room?

A. Yes, sir.

Q. And you saw a number of men there?

A. That is right.

Q. And at the time, before being taken to Mr. Fitts' room, did you ask to have your attorney communicated with?

A. Yes.

Q. And when did you first ask in regard to that?

A. I asked the arresting officer.

Q. When?

A. Sunday.

Q. Did you state whom your attorney was?

A. Yes, sir.

Q. Did you ask to have him communicated with at any time after the time of your arrest?

A. Yes.

Q. When did you next make the request?

A. I asked them again the night they were taking me up to the District Attorney's office to question me in regard to my wife's death.

Q. Now, at the time that you made that request, did you know Mr. Silverman's telephone number?

[fol. 2422] A. I had his office number.

Q. Did you give that office number to anyone and request that he be communicated with?

A. I gave it to Mr. Fitts.

Q. You gave it to Mr. Fitts?

A. Yes, sir.

Q. Did you ask Mr. Fitts that you might have your attorney present?

A. Yes, sir.

Q. And what did Mr. Fitts say, if anything?

A. He said he called Mr. Silverman and found that he was out of town and then I asked for Mr. Parsons and he said that Mr. Parsons didn't know anything about the case and it would take too long to look the transcript over and he couldn't see me.

Q. Then they started to question you in the District Attorney's office?

A. Yes, sir.

Q. And now, prior to your getting to the District Attorney's office, were any threats in the District Attorney's office made to you in connection with your making or not making a statement?

Mr. Barnes: That is objected to as calling for a conclusion of the witness?

The Court: Overrules.

A. You mean in regard to my wife's death?

By Mr. Clark:

Q. Yes.

[fol. 2423] A. Read the question again, please?

(Question read by the reporter.)

Mr. Clark: May I reframe that question? That is not what I intended to ask.

Q. Mr. James, before you reached the District Attorney's office did anyone make any threats in connection with your making any statement concerning your wife's death?

Mr. Barnes: That is objected to on the ground it calls for a conclusion of the witness.

The Court: Overrules.

Mr. Barnes: We have no objection to what was said.

The Court: I think the form, as to whether there were any threats, or statements of that sort used, and as to whether the statement was voluntary——

Mr. Barnes: As to being free and voluntary—very well, your Honor.

The Court: —basically they do call for a conclusion, but I think they are properly called for.

Mr. Clark: It is like one of those conclusions of facts, your Honor, like a man being drunk. Go ahead, Mr. James.

A. Well, I was threatened when I was first arrested on the murder charge, and I was threatened when they took me to the District Attorney's office.

Q. Well, there is some confusion. I am referring now to the day of your arrest, and to the period before you reached the District Attorney's office on that day. Weren't [fol. 2424] you taken to the District Attorney's office an hour or so after you were arrested?

A. On what charge?

Q. Never mind what charge. When the officers first took you into custody, didn't they take you to the District Attorney's office in an hour or two?

A. Yes.

Q. Now, during that hour or two, when you had been taken into custody, and before you were taken to the District Attorney's office, were any threats used upon you, in connection with any statement, or refusal upon your part to make a statement concerning your wife's death? Just answer that "yes" or "no".

A. Yes.

Q. Who made those threats?

A. Mr. Southard and Charlie Griffen.

Q. And what threats did each of them use?

A. Well, when they arrested me, and taken me next door,

they told me that they were of the opinion, and had known about my killing my wife, and I had just as well confess it to them, or they were going to beat the Hell out of me.

Q. Now, were any more threats made by any one before you reached the District Attorney's that day?

A. I don't remember.

Q. Very well. Now, note carefully the question: Was any promise made, or any statement made of any advantage [fol. 2425] that you might gain, if you would make a statement concerning your wife's death, before you reached the District Attorney's office on the day you were arrested, personally?

The Court: You may answer that "yes" or "no", first.

A. Well, no; it was after.

By Mr. Clark:

Q. Now, after you reached the District Attorney's office, and before you were taken into Mr. Fitts' room, did any person make any statement to you concerning any advantage, either then or thereafter, that you might gain, if you would make a statement concerning your wife's death?

A. Before I had reached the office?

Q. Before you reached Mr. Fitts' room?

A. No.

Q. Now, when you were in Mr. Fitts' room, was any statement made there concerning any advantage which you might gain, or any punishment you might escape if you made a statement concerning your wife's death?

A. No.

Q. While you were in Mr. Fitts' room were any threats of any kind made?

A. Not at that time.

Q. Were any threats made in the District Attorney's office while you were being taken to Mr. Fitts' room?

A. Not that I remember.

Q. Just a moment. Now, during the time you were there [fol. 2426] in Mr. Fitts' office, did you tell—I believe I misstated that. Now, while you were in Mr. Fitts' office, were any questions asked you regarding your wife's death? I refer now to the first time that you were in Mr. Fitts' office.

A. Why, yes, they questioned me about her death.

Q. And will you state whether or not you told him that you did not want to discuss it?

A. Yes, I told him I didn't want to discuss it.

Q. When you told them that, they kept on questioning you?

A. They questioned me quite a little while.

Q. You mean by that they didn't stop?

A. No.

Q. About what time of day was it when you left the District Attorney's office?

A. That day?

Q. Yes.

A. I think it was along in the afternoon, 4:00 or 5:00 o'clock.

Q. And I believe you have already told us you were taken down to the house next to the house where you had been living?

A. That is right.

Q. And were handcuffed while you were being taken there?

A. No.

Q. Do you know who went with you down to that house?

A. I think Mr. Southard and Charlie Griffen were taking me down there.

[fol. 2427] Q. And upon reaching there, what did they do? What did they do?

A. Well, they took me in and set me down, and pulled down the shades in the house, and began to question me.

Q. What were they questioning you about?

A. My wife's death.

Q. And did you answer those questions?

A. I did answer everything they asked me.

Q. And then what happened?

A. Well, they kept that up, I think, until Wednesday morning, but the record says Tuesday, so they kept it up until Tuesday morning constantly.

Q. And Mr. Griffen and Mr. Southard were there with you all the time?

A. No, they were not there all of the time. They had, I think, 15 or 20 officers took me on reliefs about every three hours.

Q. Well, what time did they allow you for sleep?

A. I didn't get any sleep.

Q. Now, during the course of the conversation, did they offer you any reward, or anything of value, or make any

promise to you of anything, of any gain that you might get if you would make a statement implicating yourself in your wife's death?

Mr. Barnes: Just a minute. That is objected to, if the Court please, on the ground that it is indefinite as to [fol. 2428] which particular time counsel is inquiring about, and it is in the course of the confession.

The Court: I think that did have that tendency, Mr. Clark.

Mr. Clark: I asked that inadvertently, and I did not intend to, and the question is withdrawn.

Q. In the course of the conversation is what I intended to say, before you were brought to the County jail, at that house, and after you had been at the District Attorney's office, did any one hold out any hope of reward, or promise of immunity, or any advantage of any sort, that you might gain, if you would make some statement implicating yourself in your wife's death?

A. Well, Mr. Williams——

Q. What did Mr. Williams say?

A. Well, he told me that they had enough stuff on me to hang me, and that they were going to hang me for it, and that he had the authority to give me a lighter sentence if I would come clean and tell him the full story about it. He told me that if I would tell him the truth about it that he could get me a life sentence, and that he might get me off at manslaughter, if I would tell him the story.

Q. Now, about what time of day or night did this conversation with Mr. Williams occur?

A. Well, it was way in the night; I think maybe 3:00 or 4:00 o'clock in the morning.

[fol. 2429] Q. And it was a Sunday, as I understand, that you were taken into custody?

A. That is right.

Q. And this was along in the early hours of Monday morning?

A. It was either Tuesday morning, or Wednesday morning.

Q. Now, you spoke about Mr. Southard and Mr. Griffen using physical force on you. Will you tell us how that came about?

A. Well, they had been questioning me every minute, the same questions over and over, since I had been there. And

either Monday night, or Tuesday night—I have the two days confused—about 10:00 o'clock he was trying to get me to admit that I spent the night with some woman in the hotel on the 11th of August, and I didn't know what he was talking about.

Q. Who was talking?

A. Mr. Southard. Finally he said that I was lying like a dog, and he began to beat me.

Q. How long did he continue to beat you?

A. He jumped over and began to beat me, and I got hold of him, and he stopped, and then he jumped over and began beating me again. When I stopped him, Charlie Griffen knocked me loose. I told them that I had answered every question, and I didn't know what they were talking about when they were talking about this woman. And he began [fol. 2430] to question me about it again, and then several minutes later he did it again, and I grabbed hold of him again, and Charlie Griffen knocked me loose. I said, "There is no use to beat me." I told them if they wanted me to say that I stayed in the hotel with this woman I would say it. They were not satisfied with that. If they asked me a question, and if I answered it, he hit me, and if I attempted to explain, or did not answer, he would hit me. And he turned me over in that chair several times.

Q. Now, finally what did you do, as the result of the physical force that was used upon you there?

A. Well, they finally quit beating me sometime in the night, and then Mr. Williams takes hold of me and told me if I confessed I would get less punishment, and that I might get a life sentence. I told him that I couldn't tell him anything about it.

Q. And how long after talking to Mr. Williams, how long was it after that you were taken to the County jail?

A. About the time that Mr. Williams got through talking to me I collapsed, and I didn't know anything until the next day.

Q. You mean that you fainted?

A. Yes, I fainted, or passed out.

Q. At what time the next day, as near as you can tell us, was it that you regained consciousness?

A. Well, I came to the next morning. I think it must [fol. 2431] have been 8:00 or 9:00 o'clock.

Q. Were you at the same place?

A. Yes, sir.

Q. Were the same people there?

A. Well, I don't just remember who was there. There was an officer named Davis there. Whether Mr. Southard and Griffen were there, I don't know.

Q. Now, were any further threats made to get you to make a statement concerning the facts of your wife's death while you were at the house—we have got to the point now where you regained consciousness——

Mr. Barnes: As to the form of the question it is objectionable.

The Court: Yes, it is objectionable. You can change the question.

Mr. Clark: Yes, your Honor.

Q. Were any further questions asked you by any one concerning the circumstances of your wife's death, after you regained consciousness, and before you were taken to the County jail?

A. Well, I was pretty groggy when I regained consciousness, and I hardly remember what was said there.

Q. And then you were taken to the County jail, as I understand it, about the 21st of April, and remained there, except when you were taken out to court and the Grand Jury until the 2nd day of May, is that about as you remember it?

A. Yes.

[fol. 2432] Q. And on the 2nd day of May you were taken into the Chaplain's room, Mr. Southard, Mr. Griffen and Mr. Killion, and Mr. Lynch—is that the name?

Mr. Barnes: Lynch was the court reporter.

Mr. Clark: Yes, Lynch was the court reporter.

Mr. Williams: May I interrupt, Mr. Clark? While I haven't any objection to the asking of leading questions, I think at this time the witness should be required to make his own statements instead of simply answering "yes" or "no" to counsel's statements.

Mr. Clark: I tried to avoid leading questions except in a matter such as this, where I believe the question is purely preliminary and I was asking it in the interest of time.

The Court: You may proceed. If there is any objection to your question we will take the objections up as they come.

Mr. Clark: Is that right? Do you remember the incident, whatever date it was?

A. I remember going to the Chaplain's room, yes.

Q. And did you see Mr. Griffen and Mr. Southard there at that time?

A. Yes.

Q. Did you recognize them?

A. I did.

Q. Will you state whether or not you still had a memory of the physical force that had been used upon you before?

A. I will always remember that.

[fol. 2433] Q. Will you state whether on that second of May you were still suffering pain from the injuries you had received?

A. I was.

Q. At the time you were taken to the jail, besides this hernia, did you have any marks or bruises on you as the result of the force that had been used?

A. Do you mean when they first put me in jail?

Q. Yes.

A. Yes, I was black and blue from my waist up.

Q. Was any part of your head or face injured?

A. Yes, both of my ears were swollen so that I couldn't hear.

Q. What was the condition of your ears on this day when you were taken to the Chaplain's room?

A. I think my ear was still black then.

Q. By the way, had Mr. Silverman, before you were taken to the Chaplain's room, given you any instructions as to what you should do if you were questioned further by the officers?

A. He had.

Q. What instructions did he give you?

A. He told me I was going to be indicted for murder and if the officers questioned me to tell them that I wouldn't talk unless he was there.

Q. When Mr. Silverman told you that you were going to be indicted for murder, did you believe that you would be?

[fol. 2434] A. I did.

Q. Now, when you were taken into the Chaplain's room, what effect upon your mind did the presence of Mr. Southard and Mr. Griffen there have?

A. Well, I thought I was in for another beating.

Q. And did you feel free to talk in their presence?

A. No, I did not.

Q. Now, what effect did Mr. Silverman's instructions have upon your mind? Did you feel that you should follow those instructions?

A. I felt that I should do just what he told me.

Q. Then taking the circumstances as they existed at the time you were in that room when Mr. Williams told you what he claimed Mr. Hope had said, did you feel free, under the circumstances as you knew them to deny the truth of the statement that Mr. Williams communicated?

A. I was afraid to deny it.

Q. And now, do you recall a second occasion when you were taken to the District Attorney's office?

A. I do.

Q. With relation to the time you were in the Chaplain's room, when was this second occasion?

A. It was on a Saturday; I don't remember the date.

Q. Do you remember whether it was the same day, before that day or after the day that you were in the Chaplain's room?

[fol. 2435] A. It was the same day I was taken to the Chaplain's room.

Q. About what time of day was it you were taken to the District Attorney's office?

A. I think it was shortly after noon.

Q. Who took you over there?

A. I believe Mr. Gray took me over there; I am not sure.

Q. He is one of the deputy sheriffs, is he?

A. He is.

Q. Works with Mr. Killian?

A. He does.

Q. And now, to what part of the District Attorney's office were you first taken?

A. I was taken to Mr. Fitts' office.

Q. And did you, at any time, see Mr. Southard there?

A. Yes, he was there.

Q. When did you see him?

A. He was there practically all the time I was there.

Q. And when you reached Mr. Fitts' office, besides Mr. Southard, was there anyone else in there that you remember?

A. Yes, sir.

Q. Who else did you remember being in there?

A. I remember Charlie Griffen being there and most all the officers that I had seen were there.

Q. And now, will you state whether or not at any time [fol. 2436] you had a conversation with Mr. Southard in which just you and Mr. Southard took part?

A. State what the conversation was?

Q. No, just state whether you had such a conversation first.

A. I did.

Q. With reference to the time you were taken into Mr. Fitts' office when did that conversation occur?

A. It occurred about 10 o'clock that night.

Q. Where were you?

A. I was in one of the offices there; I don't know whether it was Mr. Fitts' office or the one next to it.

Q. Was anyone else present besides you and Mr. Southard?

A. No, they all cleared the room and left me with him.

Q. What did Mr. Southard say to you then?

The Court: Just a moment, do I understand that this is subsequent to the matter the admissibility of which is involved?

Mr. Clark: Yes, your Honor. In going into matters subsequent to that I directed your Honor's attention to that specifically, the thought that a subsequent statement to the date which this evidence relates would come before your Honor sooner or later, and unless counsel objected, I would go into it now.

The Court: Strictly speaking this is not voir dire testimony now.

[fol. 2437] Mr. Clark: No, it is not.

The Court: You may proceed.

Mr. Williams: May I make a statement? I don't object to it because I anticipated we could clear the entire matter up before the other statements were offered.

Mr. Clark: I think the Court was just trying to clear up the entire matter. We talked in chambers this morning and I think the Court agreed with me.

The Court: We will take our recess at this time. Counsel may have opportunity to discuss the matter during recess.

At the present time we will leave the question as it is and reserve ruling until after recess.

(Recess.)

(After recess.)

The Court: Let the record show all parties present except the defendant.

Mr. Clark: The defendant is on the witness stand.

The Court: Oh, I beg your pardon. All parties present.

Mr. Clark: Shall I proceed?

The Court: You may proceed.

Mr. Clark: Will you read me the last few questions and answers?

(Questions and answers read by the reporter.)

The Court: This is as to the matter which apparently is not voir dire.

Mr. Clark: Yes, your Honor.

[fol. 2438] Mr. Williams: If your Honor please, I may have been misunderstood. I was not objecting to the question. I merely stated that I understood that sooner or later, in connection with the other matters which would be offered, this would become voir dire and for that reason I was not objecting, your Honor.

The Court That is all.

Mr. Clark: I might say, your Honor, that in the case of People vs. Freedman we had offers of alleged confessions, a series of alleged confessions and a series of voir dire examinations and the record was quite confusing, and I thought it would make a more orderly record if we could do this as we are doing it here.

Mr. Williams: That is satisfactory.

Mr. Clark: I may say, Mr. Williams, that when the proper time comes you may rely upon me to stipulate that the evidence as to these conversations is to be deemed voir dire examination as to the conversation you wish to offer.

Read the question to the witness so that he may answer it, Mr. Reporter.

(Question read by the reporter as follows: "What did Mr. Southard say to you then?")

A. I sat at the desk and he said to me, "You have been sitting here lying to Fitts all evening just like you lied

to me when I had you out at the house." He said, "I didn't have the dope on you then, but I have got it on you now," [fol. 2439] and he said, "You are going to tell the truth here now or I am going to take you back to that house and I am going to beat your God damned head off."

Q. Did you make any answer to that?

A. I told him that I was ill from the beating that I had taken before, that I wasn't able to take another beating and that if he wanted me to say what he was relating to me in Hope's story there that I would gladly admit it and save myself other punishment.

In addition to the testimony of the defendant, Officer J. C. Southard, who was one of those in charge of the investigation, admitted that he had used physical force upon the defendant. (Rep. Tr. 1089-1090.)

Q. And during that time, also, you also used some physical force upon him?

A. I did not. That was in the other case.

Q. You say that was in the other case. You mean that some physical force was used upon him while he was in your custody, and you attributed the physical force to the other case, is that right?

A. I slapped his face in the other case.

Q. Slapping his face is the only thing you did to him?

A. That is right.

Q. What day did you slap his face?

A. I think it was on a Monday morning, the 20th of April.

[fol. 2440] Q. That would be the day before he was delivered to the County jail?

A. Yes.

Q. Did you present him in the County jail, when he was taken there?

A. I did.

Q. Did you notice any marks or bruises upon his face or head when he was taken into custody?

A. Not that I recall.

Q. Well, you did notice marks and bruises upon his head when you took him to the County jail, didn't you?

A. No, I don't believe so.

Q. Weren't both of his ears bruised and swollen at that time?

A. They were not.

Q. Neither one of them?
A. That I wouldn't say; one may have been. I wouldn't be positive. I know that both were not.

He admitted that he saw bruises on the defendant and that one of the ears of the defendant was swollen at the time the defendant was indicted on this charge. (Rep. Tr. 1091.)

Q. You saw the bruises here when he was in court?
A. The left ear was a little bit swollen at the top.

[fol. 2441] We respectfully submit, therefore, that under authority of Brown v. Miss. the defendant's rights under the Due Process Clause of the Fourteenth Amendment to the Constitution were violated. The entire proceedings are void and require a reversal of the judgment.

Every agency of the State is covered by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Mooney v. Holohan, 294 U. S. 103.

III

That Prolonged Questioning without Sleep and under Tortu-ous Mental Ordeal, Similar to that Employed in the Dark Ages, and in the Torture Chamber, were Used upon the Defendant, and Statements thus Extorted and Coerced were Permitted in Evidence in the Trial. That the use the Alleged Confession in Evidence Obtained by of These Methods was in Violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

In Rounds v. State, 106 S. W. (2d) 212 (June 10, 1937) the court held that use of confessions obtained from a defendant who had been deprived of sleep is no less severe a form of torture to obtain a confession than physical violence, and that the use of such means of torture to obtain a confession is violative of due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and vitiates the verdict.
[fol. 2442] In that case the court said:

"To deprive a human of sleep for four days and nights is a form of torture not less severe than physical violence. See Ziang Sun Wan v. United States, 266 U. S. 1, 45 S. Ct.

1, 69 L. Ed. 131. The effect of this treatment on Rounds is apparent from uncontradicted testimony as to his physical condition just after his confession was obtained. The sheriff and all the officers testified that Rounds went into a religious frenzy, said he was talking to Jesus, began shouting and demonstrating as if at a negro camp meeting, and generally making so much noise that the officers called in the county physician about daylight Friday morning shortly after the confession had been procured.

This physician corroborated the testimony of the officers as to the condition of Rounds, and the doctor thereupon found it necessary or proper to administer to Rounds a hypodermic injection of one-half grain of morphine to quiet him down.

The officers testified that Rounds put on this demonstration because he claimed to be happy to have gotten the load of guilt off his mind by the confession. The substance of [fol. 2443] Round's testimony is that he was happy because the efforts of the officers to make him confess had ceased.

Whether the officers subjected this defendant to physical violence was a matter of controversy on the trial below and we need not go into that. That the officers did subject him to a course of treatment—keeping him awake as stated—that rendered him hysterical and necessitated the attendance of a physician is perfectly obvious.

A confession so obtained is not admissible. Resort to torture, in any form, by officers of the law, is not to be countenanced.

In Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682, the Supreme Court of the United States has recently held that the use of a confession obtained by torture is a denial of due process under the Fourteenth Amendment to the Federal Constitution, and we think it immaterial whether the torture was administered by brute force or by some method more refined. See, also, State v. Fields, 7 Tenn. (Peck) 140; Ann v. State, 30 Tenn. (11 Humph.) 159; Deathridge v. State, 33 Tenn. (1 Sneed) 75, 76; Strady v. State, 45 Tenn. (5 Cold.) 300; Self v. State, 65 Tenn. (6 Baxt.) 244."

Under Point II, we have shown the physical force used. [fol. 2444] We point out the following facts, which are uncontradicted in the case *at* bar:

The defendant was constantly questioned, without being permitted to sleep, and after he had been struck, for fifty hours of continuous questioning in which a number of officers and State Agents took part. He was not permitted to go to sleep during this prolonged interrogation. The questioning continued in the absence of any attorney representing the defendant. He was not permitted to communicate with or have any attorney or other person present, in itself a violation of due process of law, guaranteed by the Fourteenth Amendment of the Constitution of the United States.

"The State may not deny to the accused the right of counsel." Powell v. Ala. 287 U. S. 45. "The right to counsel is a right a person has at any stage of the proceedings and under the laws of the State of California he is entitled to the aid of counsel immediately upon his arrest, and an officer of the law who fails to send for counsel is guilty of a misdemeanor and also subject to a fine."

1. The alleged confession was made to officers having appellant in forceful custody.

2. It was made after appellant had been severely beaten about the body and head.

3. It was taken after prolonged and hideous mental tor-
[fol. 2445] ture.

4. It was taken in absence of appellant's attorney and in violation of his right to be represented by counsel at all stages of the proceedings.

5. It was taken after hours of continuous questioning. Before that he had been held in custody for over forty-eight (48) hours without being taken before any magistrate or given the aid of advice of counsel. He was subject to almost continuous interrogation while his captors worked in relays, some of them sleeping while others continued his interrogation. (Rep. Tr. 1450.) While he was so held force was used upon him when his statements displeased one of his captors.

6. No confession was ever made by him to any friend or disinterested person and as soon as he was out of the tortu-ous custody of the officers he disavowed the purported confession.

7. Part of the time during interrogation he just sat and stared blankly without answering. (Rep. Tr. 1103.)

8. On such occasions, after his failure to answer, the interrogation continued with the same line of questioning.

9. After having been beaten and questioned incessantly for hours, he was threatened with further beatings if he did [fol. 2446] not confess the crime with which he was charged.

With respect to the questioning of Lisenba, we quote from the opinion in People v. Lisenba, 89 P. 2d 39, as follows:

"• • • As a result of these developments the defendant was arrested on April 19, 1936. He was not taken without delay before a magistrate nor was he immediately incarcerated in the county jail as required by sections 849 and 1597 of the Penal Code. Instead, and after some preliminary questioning in the office of the district attorney, he was taken by the officers to a private home, adjoining that where the defendant had been living with his niece, and where admittedly he was held incommunicado for a period of about forty-eight hours, during all of which time he was admittedly subjected to incessant questioning by the officers who worked in shifts. The defendant was apparently deprived of rest and sleep during practically all of such period. At least, the prosecution failed to offer any positive testimony that defendant during this period was afforded an opportunity of going to bed, a privilege concededly enjoyed by the examining officers. In addition, one of the officers testified that during the questioning he became angered and "slapped" the defendant's face when [fol. 2447] the defendant was said to have referred to the deceased as a "whore".

The foregoing statement refers to what took place before Lisenba was booked and lodged in jail.

The dissenting opinion of Justice Seawell describes what took place from that time until the alleged confession, upon which the state relied, was taken. Justice Seawell's opinion reads:

"• • • Southard said he gave instructions that James was not to be left alone at anytime; one or more investigators was questioning him at all times; some questions he answered and some he refused to answer; he would just sit

and look blankly. Southard testified that he had three meals a day but James testified that he was practically starved into a state in which he told the investigators that he would answer any question in any way that the investigators wanted him to answer it. It is the admitted fact that he was interrogated by the district attorney and his assistant, Mr. Williams, at all hours of the night, for as many as two and a half to three hours. One period continued from one o'clock to six o'clock. The officers also took part in interrogating the defendant. The plan adopted was that the investigators worked on the defendant to a point where it [fol. 2448] was deemed expedient or advisable to take him before the district attorney and if satisfactory progress had not been made he would be returned to the private custody of the investigators for the employment of such methods as would work a change of mental attitude on the part of the defendant. No other possible answer could be made to their unauthorized action which only ended with the procurement of the alleged confession. At times numerous officers would be present and sometimes, James testified, he was left with but one officer. The evidence adduced by the prosecution affirmatively shows that the defendant was shifted back and forwards in the manner herein described many times at all hours of the day and night, continuing over a long inquisitorial period. At times Hope was brought into the room, and engaged James in controversial disputes.

Officers, Killian, Gray, Griffen, Littleton, Davis and Southard were most active in procuring the alleged confession of James. The first signs of a confessional collapse, as told by Killion, occurred at midnight, May 2, thirteen days after James was taken into custody. At the above hour, in the room adjoining the district attorney's office, James said to Killion, "Why don't we go out and get some-[fol. 2449] thing to eat, and I will tell you *the story*." The conference began at about one in the afternoon and ended at about 2:30 or three o'clock the following morning—a short intermission having been taken for coffee and sandwiches. • • •

"James testified at the trial that practically everything he told Killion, Southard and the district attorney concerning the death of his wife was the story which the investigators had drilled into him for hours for several days. He said he was not able to stand further beatings and physical

punishment with which he was threatened; that if he gave an answer to a question which did not suit the questioners he was struck on the head. He had also received one or two terriffic beatings at the hands of Southard and Griffen; he would have preferred death rather than be returned to the private residence, which the officers threatened to do, where most of the punishment was inflicted. The story he told Killion had been repeated a "thousand" times to him; for days when they repeated to him Hope's story he told the officers that he did not know what they were talking about until he was finally coerced into submission. * * *

"The record shows that at least three members of the district attorney's staff and some ten or twelve investigators [fol. 2450] and officers had to this point been making continuous and vehement efforts to get a confession from James. Immediately James was taken to the district attorney's office by automobile where District Attorney Fitts, Chief Deputy Attorney Stewart, Chief Blummber, Officers Griffin, Jack Southard, Davis, Killion, Gray and Miss Adams, the statement reporter for the district attorney's office, were assembled. Hope was also present. It was then around two o'clock in the morning. James was greeted as follows: Mr. Fitts: "Mr. James, the boys have told me that you told the story." Mr. James: "They have got it." It was suggested by the district attorney that he begin in his own way and relate the story. James answered that it was a very long one and it would take three or four days to tell it. * * *

"It may be noted that during the period of intense questioning which continued throughout several days, no statement reporter was present to report the methods by which the confession was attempted to be induced. * * *

"It was only when the time was deemed ripe for a confession that a reporter was called in to report the proceedings and in no instance were the preliminary things done [fol. 2451] and said, which caused or forced the alleged voluntary confession, made to appear as a part of the report. These important matters, so far as referred to at all, rest in parole. Neither was the defendant properly advised as to his rights or permitted to have independent advice or counsel at the times when the exercise of such rights would have been of benefit to him. * * *

"It is true that several officers testified in terms of conclusions that no violence was inflicted upon the defendant

or promises of immunity were made to him in their view or to their knowledge, but this does not meet the situation. Some were not called to testify and others may not have been present at the times the physical punishment was used. From the record before us the conclusion is irresistible that unlawful means were employed by concert of action from the first to the time defendant made the alleged Killion statement to force a confession. The burden cast by law upon the people was not met. The case of People v. Dye, 119 Cal. App. 262, 269, 273, 6 P. 2d 313, 316, is directly in point here. Dye was convicted of murder in the second degree. The defendant, being suspected of murder, was taken into custody and confined in the Beverly Hills police station after the same fashion as the defendant here was [fol. 2452] held in custody by the officers at a private residence. Precisely the same kind of method—though by no means as extreme—were adopted there to coerce a confession from the defendant as were adopted in the instant case. Mr. Justice Conrey, then Presiding Justice of the Second Appellate District, Division One, District Court of Appeal, was the author of the opinion which reversed the judgment of conviction and the order denying a new trial.

"In discussing the methods by which the confession was procured, the late Justice Conrey said in part: "It shows a persistent questioning of the defendant about various matters, many of which related to the tragedy * * * including a direct charge, which defendant denied * * *. During the night the defendant became weary and sleepy (in the instant case he became not only sleepy but fainted), but the questioning went right on. Officer Gray admitted that twice he told the defendant 'to sit up in his chair'; that the defendant 'may have been nodding; he was not asleep.' In view of the inquisition that was going on, and the condition of the prisoner, these orders were in effect a kind of coercion. The circumstances of the questioning, and the [fol. 2453] method thereof, were well calculated to force a confession of guilt, but the process was not at that time successful. It was only after six hours more of questioning * * * followed by three days more of secret imprisonment, that the confession was finally obtained * * *. Considering the wearing-out process of inquisition, the secrecy of the imprisonment, the isolation of the defendant, and the unlawful failure to take the defendant before the magis-

trate (Pen. Code, 821, 824, 849, and 145), the transaction has all the earmarks of a deliberate attempt to force a confession by every means short of promises, direct threats, or actual violence. (In the case at bar a direct act of violence in at least one instance is admitted. As to others the evidence is quite convincing.)"

"After discussing the fundamental rules governing the voluntary character of confessions, the decision turns to the claim that the confession having been made a few days after the effect of improper methods had ceased to operate on the defendant's mind, the evidence thereby became admissible. The decision continued: "It is also true that if threats and inducements are made to a prisoner, *and within* [fol. 2454] *a few days thereafter* he makes a confession, such acknowledgment of the commission of the crime may not be introduced in evidence, unless it clearly appears that the threats and inducements had ceased to operate upon his mind to bring about his statement of his own guilt." (Citing a number of decisions of our own and appellate court decisions.)

"The following pertinent paragraph concludes the discussion: "The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. "It is an essential part of justice that the question of guilt or innocence shall be determined, by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected." (Opinion written by Mr. Justice Sloss in People v. O'Bryan, 165 Cal. 55, 130 P. 1042.) People v. Wilson, 23 Cal. App. 513, 524, 138 P. 971, 975."

IV.

That the Principal Evidence Against the Defendant Was that of an Alleged Accomplice Named Charles H. Hope. That Since the Trial the Said Charles H. Hope Has Made Affidavits and Filed the Same in the Superior Court of Los [fol. 2455] Angeles County, Stating that His Testimony Was Obtained by Deceit, Fraud, Collusion and Coercion and Was Entirely False; that He Was Impelled by Force and Fear, Threats and Promises, and that All These Facts, Including the Falsity of His Statements, were Known to the

Prosecution and Participated in by Them. That Testimony Thus Obtained and the Conviction Based Thereon Make a Trial a Mere Pretense and Are All in Violation of Due Process of Law, Guaranteed by the Fourteenth Amendment of the Constitution of the United States.

In Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 347, the Supreme Court of the United States said that the constitutional requirement of due process is not satisfied where a conviction is obtained by the presentation of testimony known to the prosecuting authorities to be perjured. The court there said:

"It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a [fol. 2456] like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, "whether through its legislature, through its courts, or through its executive or administrative officers." Carter v. Texas, 177 U. S. 442, 447, 44 L. ed. 839, 841, 20 S. Ct. 687; Rogers v. Alabama, 192 U. S. 226, 231, 48 L. ed. 417, 419, 24 S. Ct. 257; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 234, 41 L. ed. 979, 983, 984, 17 S. Ct. 581.

Reasoning from the premise that the petitioner has failed to show a denial of due process set forth in his petition, the Attorney General urges that the State was not required to afford any corrective judicial process to remedy the alleged wrong. The argument falls with the premise. Frank v. Mangum, 237 U. S. 309, 335, 59 L. ed. 969, 983, 35 S. Ct. 582; Moore v. Dempsey, 261 U. S. 86, 90, 91, 67 L. ed. 543, 545, 546, 43 S. Ct. 265.

We are not satisfied, however, that the State of California has failed to provide such corrective judicial proc-

ess. The prerogative writ of habeas corpus is available [fol. 2457] in that State. Constitution of California, Art. 1, 5; 6, 4. No decision of the Supreme Court of California has been brought to our attention holding that the state court is without power to issue this historic remedial process when it appears that one is deprived of his liberty without due process of law in violation of the Constitution of the United States. Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that constitution. Robb v. Connolly, 111 U. S. 624, 637, 28 L. Ed. 542, 546, 4 S. Ct. 544. In view of the dominant requirement of the Fourteenth Amendment, we are not at liberty to assume that the State has denied to its court jurisdiction to redress the prohibited wrong upon a proper showing and in an appropriate proceeding for that purpose."

Again, in Jones v. Commonwealth of Ky., 97 Fed. (2d) 333, the Circuit Court of the United States held:

"Where falsity of perjured testimony upon which conviction was obtained is discovered after the conviction, as well as where the testimony was known to be perjured when presented, the state must afford corrective judicial process. Const. Amend. 14."

In that case the appellant was convicted of murder and [fol. 2458] sentenced to death by a Kentucky court. Newly discovered evidence offered to the State's Courts in support of the several petitions thereto addressed, cast grave doubt upon the competency and freedom of duress of one and upon the veracity of *the* both of the prosecutions' principal witnesses. The court there said:

"Nor are constitutional safeguards maintained or responsible for the judicial process promoted by convictions secured on perjured testimony."

In that case the court, quoting the case of Mooney v. Holohan, says:

"If it be urged that the concept thus formulated but condemns convictions obtained by the state through testimony known by the prosecuting officers to have been perjured, then the answer must be that the delineated requirement of due process in the Mooney case embraces no more than

the facts of that case require, and that 'the fundamental conceptions of justice which lie at the base of our civil and political institutions' must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but fortunately not too late its falseness is discovered, and that the state in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired."

In connection therewith, we submit two affidavits filed in [fol. 2459] the Superior Court of Los Angeles County by Charles H. Hope, who testified in this case, and which affidavits set forth in detail that his testimony upon which this conviction was based was perjury and was the result of coercion.

[fol. 2460] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

No. C-64218

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

MAJOR RAYMOND LISENBA (also known as ROBERT JAMES), and Charles H. Hope, Defendants

AFFIDAVIT OF CHARLES H. HOPE AS TO FURTHER SPECIFIC INSTANCES OF KNOWING INDUCEMENTS AND USE OF FALSE TESTIMONY BY DISTRICT ATTORNEY AND HIS DEPUTIES AND INVESTIGATORS—Filed in Support of Charles Hope's Motion to Withdraw Plea of "Guilty" and to Set Aside Judgment

STATE OF CALIFORNIA,
County of Marin, ss.:

Charles H. Hope, being first duly sworn, deposes and says: I make this affidavit to supplement the affidavit and motion filed by me in C-64218, in the above entitled proceeding of People vs. myself and James or Major Raymond Lisenba.

1. I had no idea that said state prosecuting officials secretly and fraudulently intended to use the same false tes-

timony which they induced me to give as aforesaid against me in my own hearing, as well, which they later did by the [fol. 2461] trick and device of a stipulation the meaning of which I was ignorant.

2. Reading these affidavits in connection with what is said in the dissenting opinion of the Supreme Court in Peo. v. Lisenba, 97 California Decisions, 378, affiant invites attention to at least three specific instances of violation of law by State prosecuting officials referred to, to wit: section 137 and other sections of the penal code, "upon understanding and agreement that the testimony of said witness shall thereby be influenced or who *attempts* by any *other means* fraudulently to induce any person to give false or withhold true testimony is guilty of a felony"; and in this behalf, affiant invites attention to the fact that the forcing of confessions from James and affiant both, and the attempt thereby to induce both of us to give false testimony is also a felony of and in itself. Affiant avers that his own conduct in giving such testimony *was* so induced was not wilful, but excusable because given under duress of threats of death by hanging, as well as false promises referred to.

3. The three specific instances, among others, of the knowing inducement and use of false testimony by state officials is as follows:

1. That the snake bit and poisoned the decedent, thereby enabling the state to supply a missing vital and material element of the corpus delicti of the offense charged, when the said district attorney and his deputies and investigators [fol. 2462] knew the same to be false, knew that affiant knew it to be false, and which affiant knew to be untrue;

2. That no promises of leniency or reward had been made to affiant, to induce his testimony;

3. That no threats had induced the false testimony; in instances "2" and "3" entering into the deceit practiced on the Court and jury, and being material evidence going to the credibility of the witness and the weight to be given by the jury to the witnesses testimony.

A number of other specific instances can be stated as to forcing me to testify that the woman moved or let out a sound and showed signs of life, to prove she was alive, at the

time they claimed she had been bit by the snake; and inducing me to place the time of my arrival at the house several hours earlier, and to supply other deficiencies in their proof.

Affiant avers that said state prosecuting officials practiced collusion on the court and jury in attempts to give credence to the State's theories and case, (quoting from dissenting opinion, (399 to 469) "If death was in fact caused by an attempt to perform an abortion, he would not have thrown away an opportunity to avail himself of that defense", and practiced collusion also by the false representations upon the trial to the court and jury that affiant's testimony was free and voluntary and not exacted by promises of immunity but "having been moved solely by the promptings of conscience, and not at all induced by [fol. 2463] promises or understandings", as pointed out to be material by the Supreme Court at p. 403 of said Opinion; and that as a part of said practice of deceit, deception and collusion, one of said court officials, *as a part of such prearrangement and design* to improperly influence the jury and to further this deception, could hardly control himself when Judge Fricke went off half-cock and found me guilty of first degree murder, but dashed by me on the stairs, unlocked the jury door and told the jury then deliberating James' case that mine had been set at first degree murder." That this was part of the pre-conceived plan to improperly influence a verdict and was done in order to lend credence, and to dissipate suspicion that the thing was not wholly above-board but induced by promises and as the result of collusion and a collusive understanding and connivance between the state prosecuting officials and affiant. This was also done to buttress and strengthen the state's argument to the jury (p. 403 of the Opinion: "That if the abortion theory was true, Hope would have been a foolish man to have entered a plea of murder in the first degree with a possibility of suffering the extreme penalty"; and the announcement that affiant had been found guilty of murder in the first degree amounted to the giving of evidence to the jury in an unlawful manner, with the covert purpose of unduly and fraudulently influencing their verdict, in connection with said other acts and said conduct forming [fol. 2464] a part of and overt acts under said general scheme and pre-conceived plan, design and conspiracy to

obstruct and pervert the administration of justice and to improperly influence a verdict.

That affiant was induced to give false testimony by said state prosecuting officials which they knew to be false, which he knew to be false, and which they knew that he knew to be false, and that they did so with the corrupt motive and purpose of supplying defects in their evidence and to improperly and thereby unlawfully convict both affiant and his co-defendant of murder in the first degree, as well as to keep from the jury the due consideration of any lesser offense included in the charge or shown by the evidence, under the improper mandatory instruction obtained of the Court that "if it returned a verdict of guilty, it could not be less than murder of the first degree" (p. 403 Opinion). Also to avoid a fatal variance between offense charged and the evidence, requiring a dismissal of the case.

Affiant avers that he was informed by his counsel, Mr. Cuff, a public defenser co-operating with the district attorney in the disposition of criminal cases, that said counsel had been informed by Eugue D. Williams, Deputy District Attorney then in charge of the case, that they (the State) had "nothing" "nothing on" affiant, that your affiant believed and relied on said statement which was knowingly falsely made to deceive your affiant, that your affiant was thereby misled and deceived and taken by surprise, and as [fol. 2465] he wrote Judge Fricke later protesting the action (letter of affiant to Judge Fricke, May 19, 1937, replied to by said Judge on June 10th, 1937, Exhibits —, annexed to first affidavit, hereby made a part hereof by express reference in this connection), affiant was "dumbfounded" when the court summarily pronounced him guilty of 1st degree murder; that said Mr. Jack Southard and other deputy district attorneys or investigators, with knowledge of all other state prosecution officials, had falsely represented to his affiant and led him to believe that he and they would take the stand in behalf of affiant and introduce evidence of innocence in his behalf and use their best efforts to secure his release; that all of said promises were wholly false, made to deceive affiant, did deceive affiant, and were made corruptly to influence and induce said plea and his said testimony as aforesaid; and did induce same; and same are here set forth as facts and circumstances of fraud; that affiant did not know that his plea of guilty could and

would be received as a confession of murder in the first degree or murder and he did not intend it as such, but only as a subterfuge or arrangement under his understanding or believed understanding with the state prosecuting officials under which he would later possibly be found guilty of a minor offense such as failing to properly or promptly report as to the facts, or possible complicity in an attempt of some kind to conceal evidence, if affiant was guilty of any crime or misdemeanor, which he does not believe he [fol. 2466] was; that affiant was taken advantage of and thereby by fraud deprived of a trial and right of trial on the merits, in circumvention and violation of his rights under sec. 13 Article I California Constitution and the Fourteenth Amendment to the United States Constitution; that for this reason the proceedings and judgment are void, as the law does not countenance a district attorney thus manufacturing false evidence to imprison.

I aver that said plea of guilty, said testimony on the trial by me, my statements to the prosecuting officials before and at the trial, and the said judgment were all secured by said state prosecuting officials by the practice of deception and fraud by the said officers on the court and jury and upon me; I aver that the said plea of guilty and said judgment and said false testimony were all procured and induced by said state prosecuting officials by the exercise of intimidation upon me. I further aver that I informed representatives of said district attorney before and after the trial in substance as follows: "That Stuff About Snakes is the Bunk: The Snake Never Bit the Woman and You Know It." That the said snakes were first introduced into the picture by the investigators of the district attorney's staff, and as affiant earnestly believes had nothing to do with the cause of death.

I do therefore intend to and do hereby revoke and repudiate all of said statements and testimony as having been induced by fraud, duress by threats of hanging and [fol. 2467] imprisonment, and fear, and as not having been free and voluntary, and as having also been induced by false promises of immunity and release made by said state prosecuting officials to me, which have never been kept, and do further aver that said state prosecuting officials even up to within a short time ago, to wit, November, 1938, at San Quentin, California, repeated to me their promises and said

to me, "We Will Keep Our Word: You *keep quiet.*" Affiant avers that thereafter said state prosecuting officials wrote a letter to a chaplain at the prison, repudiating their promises and denying same and stating they would oppose any effort affiant makes to upset the case;

As a specific instance of intimidation and duress inducing said false testimony, affiant avers that just before going into the court-room to testify, the state investigators threatened him, saying: "*Now you be damn sure that you swear that the snake struck at the woman and bit her foot*", also, "*Be sure you testify that we have made you no promises, and that the snake struck at the woman's foot,—you are not out of this yourself*", and thereby sought to and did put affiant in fear and thereby attempted to and did induce him falsely to testify that those were the facts; that affiant was thereby put in fear by said threats and intimidation and solely because of fear and said promises, he testified as to the snake incident, falsely, against his will and wish, and over his protest to said district attorney and his [fol. 2468] staff that it was not true in so far as him being an eye-witness; affiant avers positively that said state prosecuting officials knowingly compelled him to give false testimony to material facts in issue on said trial, and not having before him a copy of the reporter's transcript, and it being impracticable to separate each question and answer to identify the true from the false, affiant takes the course of repudiating the testimony as false and fraudulent, in toto, that is in whole. Affiant avers that for many hours and days at a time he was subjected by said state prosecuting officials to a persistent course of threats and insistence that he give false testimony and testimony as above mentioned which he told them was not true, which affiant knew to be untrue, and which they knew to be untrue and knew that affiant knew it to be untrue, to remedy certain defects in their case and to supply the insufficiency of their evidence to make out the corpus delicti (body of the offense of murder by snakes charged); that thereafter they also fraudulently used this same false testimony against affiant himself by "stipulation" which affiant had never authorized nor consented to or understood in legal effect. That thereb. affiant was compelled to be a witness against himself in violation of his rights under the Constitution.

Wherefore, affiant prays that said judgment be set aside

and that he be allowed to withdraw his plea, and that said [fol. 2469] action be dismissed.

Charles H. Hope.

Subscribed and sworn to before me, this 28th day of June, 1939. Clinton R. Duffy, apvd., Notary Public in and for the County of Marin, State of California. (Seal.) My commission expires Sept. 3, 1942.

CRD.

[fol. 2470] No. Criminal 64218

In the Superior Court of the State of California, in and for the County of Los Angeles

The People of the State of California, Plaintiff,

vs.

Major Raymond Lisenba (also known as Robert James), and Charles H. Hope, Defendants.

Filed Jun. 30, 1939—L. E. Lampton, County Clerk. By E. V. Schwartz, Deputy

Second affidavit of Charles H. Hope as to further specific instances of knowing inducement and use of false testimony by District Attorneys and his Deputies and Investigators, and Facts of Conspiracy to obstruct and pervert the administration of justice on part of said District Attorney, his deputies, et al.

Filed in support of Charles Hope's Motion to Withdraw Plea of "guilty" and to Set Aside Judgment

To the Clerk of the above-entitled Court:

You are hereby instructed to file the within affidavit in the aboveentitled case on behalf of the defendant Charles H. Hope and to bring the fact of the filing of same forthwith to the notice (personally) of the presiding Judge of the Criminal Master Calendar Dept. for appropriate action. Due service by mail made upon Plaintiff. Dated, this 28 day of June, 1939.

Charles H. Hope (Charles H. Hope), Box, 59,885, San Quentin, California, defendant, in propria persona.

[fol. 2471] No. C—64218

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

MAJOR RAYMOND LISENBA (also known as Robert James), and Charles H. Hope, Defendants.

Affidavit and Motion of Charles H. Hope to withdraw plea of "Guilty", and for an order of Court setting aside Judgment, and an order granting a new trial.

STATE OF CALIFORNIA,
County of Marin, ss.

CHARLES H. HOPE, being first duly sworn, deposes and says:

1. I am the defendant, Charles H. Hope, named in the above-entitled action, now imprisoned in the State Prison at San Quentin, under a judgment of the above-entitled Superior Court finding me guilty, upon my plea of "guilty", in the above-entitled matter; that I was not, and am not guilty of the crime of murder or any other crime, and that said judgment against me is void, because of fraud practiced upon me by the prosecuting officials of the State of California in inducing me to enter a plea of "guilty", [fol. 2472] under a misapprehension of facts by which my legal right to defend was taken from me by a specie of fraud, all as hereinafter set forth. That I make this affidavit, to lay the foundation for a motion in said court to set aside said judgment and to permit me to withdraw said plea of "guilty", and to enter my plea of "Not Guilty" and to defend said charge on the merits.

2. Affiant avers that he has read and studied the opinions of the Supreme Court of California, in People v. Lisenba, the above-named joint defendant, 97 Cal. Dec. 378, and is convinced from a reading thereof, especially of the dissenting opinions in said case upon which a rehearing has been granted as affiant is informed, that much of the same applies to the facts of his situation and that he is not bound in law by the confessions, statements and testimony forced

from him under the circumstances hereinafter related and that it is his privilege and right, in the interest of justice, to repudiate and retract same, and that your affiant does now wholly repudiate and retract any and all statements, alleged confessions, and testimony given by him upon the trial or any other place in connection with the above-entitled matter and proceedings, as not having been free and voluntary, and as having been induced by the fraud, duress, fear, coercion and threats, and false promises of the District Attorney, his deputies and investigators of which affiant will offer testimony in open court upon the hearing of this Motion.

3. Affiant avers that from the very inception of said pro-[fol. 2473] ceedings, from the time of his arrest on continuously throughout the trial and until very recently, he has been and was subjected by the investigators and deputies of the district attorney's office of Los Angeles County, acting for said Plaintiff State, as officials of such, to a constant pressure of fear and threats, and that he was induced by said fear and threats and by false promises to make the statements and to give the testimony against himself and co-defendant which he did give; that from the very moment of his arrest, your affiant protested his innocence and stated that he was not conscious of having committed any crime or having done anything wrong, but that for nearly eighteen (18) days after his arrest and before an attorney was secured or allowed to consult with him, he was held in the private custody of the officers and investigators of the said plaintiff, incommunicado, that he requested and attorney and was refused the right to an attorney and was not allowed to see one; that during that time he was subjected to a constant grilling and drilling in the story which said deputies of the State wanted him to tell; that all of said testimony so given on the trial was by them carefully rehearsed by them to him and he was induced by threats and false promises so to testify. That your affiant is now informed that under the decision in Peo. v. Lisenba, 97 Cal. Dec. 378, the refusal to allow him counsel at that state of the proceedings, when the guilt or innocence was being decided, in the most important preliminary steps, so illegally conducted by the prosecuting [fol. 2474] officials as aforesaid, such refusal of counsel violated his rights under the Statutes and Constitutions

and render such statements, admissions and testimony incompetent and inadmissible against him. That it is his desire to and he does hereby repudiate and retract same "in toto," that is to say, in whole and not in part.

4. Affiant avers that during said eighteen days, after his arrest, when such statements were being extorted and such agreement to testify being forced upon him, he was taken to the office of the District Attorney, who threatened him in these words:

"If you don't co-operate with us, tell the truth as it is, *I will frame you if I have to.*"

That said District Attorney (Mr. Buron Fitts) then and there shook his fist in my face and told me if I did not co-operate he would get me if he had to frame me. That your affiant believed said threats and was greatly put in fear thereby, to such an extent, your affiant avers, that his free will and agency were completely destroyed, and he thereafter did as he was bid to do by said prosecuting officials, that is to say, did enter the said plea of guilty, although he was not in fact guilty, and did testify as he was told to by said prosecuting officials, the same being the testimony given by him on the trial.

5. That at said time and place, said district attorney further threatened your affiant, "I'll try you with him and I'll han*d* you with him if you don't do as you're told." [fol. 2475] The above in his office during the investigation. When I asked to see a lawyer, they refused, and said they would get the public defender to represent him, as they said they could "co-operate." That this constituted the use of force or offer of force and violence against me. Mr. Robert Stewart, then a deputy district attorney, then present at one such meeting, told Mr. Fitts in my presence, "You would rather have this case at this time before election than anything on earth. *Stop threatening* the man and listen to him."

6. Affiant further avers that he was induced to enter said plea of guilty by the above mentioned threats and fear, and by the false promises and false representations on the part of the district attorney made to affiant that if he would enter said plea of "guilty", it would be a mere matter of form, and that after the James trial was out of the way,

they would then extend him leniency and recommend same and that they would allow the court to hear and decide from affiant's evidence that affiant had not been guilty of any crime, or if he had become involved in some unknown manner in not fully or properly reporting his knowledge, that he would be found guilty of said misdemeanor only, and that he would be given full opportunity to defend and present any and all evidence; that affiant did not understand that he was entering a plea of Guilty to Murder in any degree or to homicide in any degree; that your affiant was not and is not guilty of murder or manslaughter, either as a principal or accessory before or after the fact, and that [fol. 2476] whatever he did he did in good faith and without criminal intent and without knowledge of wrong doing if there was any, which is the substance of his repeated statements to the district attorney and upon the basis of which it was agreed between the parties that the court should enter its decision; that it was never in contemplation of affiant's mind that he would plead guilty to murder or be found guilty thereof. That said promises and agreements were believed and relied upon by affiant; that they were false, were known to be false by the district attorney and his agents and were knowingly made with the intent to deceive and mislead this affiant and to induce him to enter said plea of guilty, and that the same did have that effect. That upon the conclusion of James trial, your affiant was given no opportunity to defend such as he had anticipated and as he had been promised; the foregoing promises were broken and your affiant was summarily found guilty of murder in the first degree and thereafter sentenced for same. That the foregoing facts and other facts which affiant will adduce in support hereof constitute fraud on the part of the prosecuting officials and render said plea and judgment void.

7. That the illegality of the proceedings, the violation of the numerous criminal statutes and clauses of the Constitution for protection of citizens placed as defendants on trial, and knowingly and wilfully compelling both defendants to give false testimony against themselves has been pointed out by the Supreme Court of this State in the decisions in the case above mentioned Peo. vs. Lisenba, and [fol. 2477] that the same apply to your affiant, and your affiant makes all of same a part hereof by express reference

in this behalf, as showing a scheme and general plan of action on the part of the prosecuting officials themselves, which render the same admissible, under the same theory which they used to introduce incompetent and inadmissible evidence of previous alleged "crimes" of like nature against co-defendant of your affiant.

8. That ever since the consummation of said fraud as aforesaid, your affiant has been as "the voice of one crying in the wilderness", that he was unjustly and fraudulently convicted of a crime which he did not commit, if any crime was committed by any one; and in this behalf, affiant avers that he was acting under stress of hysteria and excitement, threats and fear at the time of the trial, but that subsequent reflection has lead him to the believe that his co-defendant James was in such a condition of mind as to be temporarily incompetent whether from alcohol or otherwise, and his evidence hence of no value, (Mythomania) at the time James found the dead body of his wife, following a long series of attempts on her own part to commit the crime and wrong of abortion or infanticide (murder of baby) and as a direct result of the effect of the drastic medicines and methods resorted to by her to that end which unfortunate misdirection of mind on her part has caused suspicion to point to those who were in contact with her; that your affiant does not believe that defendant James was capable of understanding what he was saying or doing, [fol. 2478] due to intoxication and mental condition then present, and his statements were of no evidentiary value and were not believed by me; that your affiant has no personal knowledge as to whether or not a crime was committed by any one except the decedent, who, according to testimony, was engaged in attempted abortion of herself, a very dangerous thing, especially if followed by a bath and severe hemorrhages followed by sudden heart failure; whether or not she drowned herself — was drowned accidently, affiant does not of his own knowledge know and upon a new trial he will contest the right of the state to introduce any statements or testimony of alleged confessions or testimony on the previous trial, and will put the State to their proof, believing that they have no evidence and can produce none sufficient to justify this case being given to a jury. That the course of action described in Dissenting Opinion of the Supreme Court, as to the building-up of a

case by over-zealous and ambitious officials, who had created a certain theory in their own imagination, and then sought to compel affiant and others to give false testimony to fit that vision, affiant avers to be true in fact.

Specific Accusation and Complaint Against State Prosecuting Officials (District Attorney and Men) for "Willful or Corru[illegible]" Misconduct in Office" Under Sections 658 and Section 771, inclusive, of the Penal Code of California

[fol. 2479] 8-A. Affiant Charles H. Hope further specifically avers that in the "statement" filed by the district attorney on file in this case it is said: "Hope, (affiant herein), was an accomplice of Major Raymond Lisenba, in an effort to kill Lisenba's wife by rattlesnake poison, *although this method of killing the wife failed*, Lisenba completed the job by drowning her in a bath tub." affiant avers that the decisions of the courts hold, and it is the law, that where an alleged attempt to murder fails, and where death ensues not from such attempt but from supervening or subsequent causes, or a separate and independent assault with which the accused had no connection and no participation, or knowledge or intent and no pre-conceived design, it is a good defense entitling him to an acquittal. That before the jury and court were justified in finding affiant guilty of murder in the first degree, as the court did find this affiant so guilty upon his plea of guilty to whatever crime the evidence might show and not his plea of guilty to murder as has been falsely shown by the record, due to a mistake of fact, it was incumbent upon the state to prove beyond a reasonable doubt that the alleged attempt against life by rattlesnakes caused the death, and that said rattlesnakes were not merely on the premises, but that they actually struck and bit the deceased infecting her with fatal poison, proven beyond a reasonable doubt as a cause of death. If doubt existed, affiant was entitled to an acquittal. Affiant accordingly avers that the procurement of false testimony by the state, knowingly and willfully that the rattlesnakes [fol. 2480] had bit the deceased, when as a matter of fact affiant refused to so testify and said that that story was all "bunk" or untrue, was very material matter, which the state prosecution officials know and knew to be false, under secs. 127, 128 Penal Code.

8-B. Affiant avers that this issue, this theory of the prosecution of death by rattlesnakes was and is a false one, and was known to the state prosecuting officials to be false; that for many days prior to the James trial, affiant was subjected to a constant gruelling by the district attorney and his staff of investigators, in which he was solicited, procured and requested to falsely testify against his will and for and on behalf of the State to the rattlesnake fiction or story known of "Macbeth hellish brew of the dancing witches" fame, Vol. 97 Cal. Dec. at p. 463, Peo. v. Lisenba, this case due to such characterization by the classic or classical opinions of the Supreme Court of California, a part of the law of this case, of which this court must take judicial notice and knowledge; affiant avers that prior to taking the stand he at all times told the said state prosecuting officials (with exception of Eugene Williams) C. H. among them Messrs. Buron Fitts, Bob Stewart, Scott Littleton, Jack Southard, and others mentioned in the transcript of the trial as being present, to which reference is hereby made for further particulars, that to his knowledge no rattlesnake ever bit or poisoned James' wife; all notwithstanding their knowledge of the falsity of said, said state prosecuting officials did coerce and compel this af- [fol. 248] fiant, by threats of framing him and hanging him, and by intimidation as well as by false promises of immunity and release, too numerous to mention, to testify falsely that the rattlesnakes of the district attorney's creation had in fact struck at, bit and poisoned the James wife, in the presence and seeing of affiant; affiant will restate this elsewhere in his affidavits, to supply other elements to make it clearer.

Affiant here appears in the first person:

I was held incommunicado in Glendale, brought from there to Grand Jury room (had never seen a lawyer) and told by Jack Southard that I would be told in the "room" that I had rights but that I had better disregard that and tell the story that they had given me and that had been gone over by them with me hundreds of times. (See p. 421, of Peo. v. Lisenba, 97 Cal. Dec. 421); also to say that I had not discussed what he proposed to testify to with any one, also to say that I had not been promised anything, the state prosecuting officials well knowing all this to be false and untrue.

Affiant further avers in the first person:

"During James trial as I was preparing to take the stand, Southard told me it was *absolutely necessary* to say I saw the snake bite the woman, I refused. He said I would at least have to say the snake struck at the woman. He explaining that I should say this and not that I did not know. He further stated to me "You'd better: You're not out of this yourself yet'."

[fol. 2482] "The further fraud of the District Attorney in not allowing my day in court and said decree after my plea without defense promised and until after I had testified and holding a death threat over me if I did not.

I hope this makes it more clear. However, the thing is simply this as far as I'm concerned,—all these doctrines were conceived in error, founded on fallacy, propagated by falsehood, and error, in short, puerile, idiotic and utterly asinine.

(Copies from Memorandum to Scribe in my own hand writing May 11, 1939.)

Affiant will ask leave of court for a continuance for time within which to prepare and file his evidence as to the false promises operating upon the entry of plea of guilty and upon the procuring of the false testimony on the trial, as his present time and station, without private counsel, necessitates. Suffice it to say that this pretense of friendship for affiant and his wife extended throughout the Conversations and contacts and proceedings both before and upon and after the trial and up until a very recent date, and said promises and agreements were tantamount to assuring this affiant that he would be found guilty of a minor misdemeanor, or after the surprise conviction resulted, the story was adapted to the situation to include an immediate commutation of sentence or pardon as soon as the case should be settled in the Supreme Court and James [fol. 2483] hanged. They promised but failed, to take stand

C. H. Hope

in my defense. ~~Promises extended to assistance to the~~

C. H. Hope

~~family of your affiant, and lucrative employment.~~ That none of said promises were ever kept; that they were wholly false, made in bad faith, and were elements of deception and fraud entering into the trial and proceedings above

mentioned. A "bill of particulars" will be furnished any one on request.

1. That, at and within the County of Los Angeles, State of California, on or about, June 22, 1936, said persons and each in persuance of their pre-conceived plan, and acting in common concert did plan to procure convictions by inducing and using false testimony or threaten and abuse this affiant that if he did not testify that rattlesnakes were used to cause death that they would frame affiant and hang him; that he was subjected to the same kind of insistent questioning for hours and treatment such as was administered to James, and that the same finally broke down his will and despite his original insistance to the contrary, he was compelled by threats and in mortal fear of his life, as well as induced by the false promises of immunity referred to in other parts of this affidavit, to testify to the rattlesnake story on the trial; that the same was su-stantially false and known to the district attorney and his said men to be false.

2. Affiant further avers that, since his imprisonment he has obtained what purports to be a copy of the reporter's transcript of July 24, 1936, when he was found guilty or [fol. 2484] sentenced that he has remained in ignorance of the legal significance of this statement:

"There Already Has Been a Stipulation That the Court Might Take Into Consideration the Evidence Given in the Trial of Major Raymond Lisenba, Also Known as Robert James, Under Indictment With This Defendant, for the Purpose of Fixing and Determining This Matter."

Affiant avers that this is stark fraud, in that he never at any time ever stipulated or agreed thereto; that at the time of that hearing in court, your affiant did not even know what the word "stipulation" meant, and that he did not understand that by that means the district attorney was having him agree that the testimony of his co-defendant, and all other testimony given in James trial, would be used against him for the purpose of determining what crime, if any, he had committed; but on the contrary affiant avers that he at that time believed and was led by the statements of the district attorney and his own counsel to believe, that only affiant's own testimony would be considered; that affiant had expected to be given oppertunity to introduce fur-

ther testimony corroborative of his own testimony of innocence and lack of knowledge of crime, but that no adequate opportunity so to do was given. That your affiant was as ignorant of that legal effect of said "stipulation", as he believes that the Supreme Court points out that his co-defendant was of the like trick of the District Attorney in asking James if he had anything to "add" to affiant's state-[fol. 2485] ment; the effect in both cases being to bind them with statements and testimony, without their knowing or intending it. That your affiant never at any time authorized his counsel or any other person to make such stipulation or any stipulation of like nature; that your affiant was likewise ignorant of the legal effect of the further stipulation in the record that he was present during the taking of such testimony of James, so used against him without his knowledge; that he was ignorant of the law that he was required to deny the truth of said testimony or be bound thereby. That therein and thereby your affiant's Constitutional right to the assistance of counsel was violated, and he was and is deprived of his liberty without due process of law, which is here set up and assigned as a violation of his rights under Sec. 13, Article I of the California Constitution, and the Fourteenth Amendment to the United States Constitution. That said facts are also detailed as facts of fraud.

3. Affiant wishes the court to see that counsel are in attendance, that a continuance of 30 days or reasonable time be allowed to prepare and file further evidence, and prepare for trial, and that an order for his attendance as a witness be made; affiant further desires that the court make its order prohibiting any member of the district attorney's staff or an officer of California interested in prosecution from contact, intimidating or molesting affiant or subjecting him to any undue restraint or in any manner to unduly influence his free and voluntary pursuit of this proceeding; [fol. 2486] that counsel not associated with either district attorney or previous public defender's office, be appointed; that the present district attorney and staff be disbarred and suspended from prosecuting this action, and that the court appoint the Attorney General to supercede him.

Anticipating the usual denial of omission of public duty, affiant also quotes from Shakespeare, Author of Macbeth, a classic drawn from by the Supreme Court as to the hellish brew of the witches in that like fantastic creature of the

imagination, here paralleled by the State prosecution, and predicts that their answer in substance will be: as that of the debtor banished for treason: in "As you Like It".

"Never as much as in a thought unborn did I offend your Highness; (answered). Thus do all traitors: for every purgation did consist in words, They are as innocent as grace itself."

Wherefore, your affiant prays that said judgment be set aside; that he be allowed to withdraw said plea of guilty, and enter his plea of not guilty; that he may have the further and additional incidental relief all as fully indicated as desired in paragraph eleven (11), above; and that he may have such other and further order or judgment as may to the court seem fit and proper.

Charles H. Hope.

Subscribed and sworn to before me this 22nd day of [fol. 2487] June, 1939 —C. H. Clinton R. Duffy, Notary Public in and for the County of Marin, State of California. My commission expires Sep. 3, 1942.

[fol. 2488] Copy

Exhibit A

California State Prison,
San Quentin, California,
May 19, 1937.

Hon. Charles W. Fricke, Judge Superior Court, Los Angeles, California.

Your Honor:

If I am in error in addressing your honor, please be kind enough to excuse me and my ignorance of the proper procedure.

I was identified with the James case, tried in your court, sentenced to life imprisonment. I wish to make a few statements, and ask a few question- —of a confidential nature— if it please your honor.

Is it correct that the trial judge has no jurisdiction over cases after one year? If I were to prove to you, beyond doubt, that I did not conspire, and that I was in ignorance of

what was going on, would you recall me to review some vital evidence, smothered, when I appeared before you for sentence?

This takes me back a year, when, in a conversation with the late Deputy District Attorney, Mr. Bob Stewart and investigator Jack Southard, I mentioned, throughout, I was not guilty of murder, or that I had no knowledge of a murder being planned. So, they put it up to me in this way.

"Did I think I had done something wrong?" I answered [fol. 2489] yes, but I didn't know to what I would be willing to plead guilty. My thought was to lay the facts before the court, and let the court decide; this with the understanding that I should have the opportunity of explaining my side of the case.

A few days later Mr. Southard came to me and said: "Everything is taken care of, and you are to have your day in court, at the end of the trial." I was not very enthusiastic about the arrangement, until later, Mr. Cuff came and reassured me on the same premises. I asked him point blank if a judge could free me, or fix sentence on any charge the evidence might warrant. He told me—"Yes". He did say, however, that I would do some time, regardless of any evidence, although to this day he does not know what I was prepared to present; namely, I think, because he went into it only far enough to satisfy himself, that I had killed no one,

Well, they talked me into the plea of "guilty" and we came into your Honor's Court. Among other things said, I remember because I was particularly listening for it, was your Honor's remark, that the degree of crime and time of punishment would not be set until after the evidence was presented. This was what was promised me, what I considered fair, naturally assuming this meant all the evidence; proof that would throw an entirely different light on the case, as it affected me, as well as bring some startling facts to light.

[fol. 2490] My day in court arrived, and Mr. Cuff stated that they were ready to present our case. The court replied, "that it would do no good, His mind was already made up—it was first degree murder." I was dumfounded, and arose to object when Mr. Cuff failed to do so, but he merely pushed me back and said; "Keep still!" Later he put me on the stand and asked a few unimportant questions, to which I made answer, thinking all the while * * * "I am

found guilty of murder, when I know I am innocent and can prove it." But how? The chance I had been promised in order to get me to plead guilty so I could testify never came.

I cannot bring myself to believe your Honor was aware of this and various other things, I was led to believe you knew, and still not give me the opportunity to tell my side of the story. Neither do I like to believe, it was a deliberate breach of faith on any one's part, rather, the mass of secret information appeared negligible to my advisors.

For example;—an insignificant one if you choose—Can the District Attorney give a complete and coherent solution as to how Mr. James came to be watched for these many months, and finally arrested on incest? I have read some six or seven versions of it. None agree. I can tell you in three words *was* caused it and why it was done. Does a person guilty of crime go this far to be caught?

I have heard many times, that, though severe, your Honor is fair and just. I believe this to be a fact—therefore this [fol. 2491] letter. Give me a chance to remove some of the shame and disgrace that has been heaped upon those I love; the stigma I have borne, unjustly. My burning desire to appear before you and tell my complete story is born after months of meditation and same deliberation, without malice toward anyone, only that justice may prevail.

It has been over a year since my arrest. My record at Folsom and since I have been transferred here is clear. I do my work to the best of my ability and mind my own business.

May I please expect a reply from you at an early date.

Yours respectfully, Charles H. Hope, Box # 59885, San Quentin, Calif.

[fol. 2492] Copy

Exhibit B

The Superior Court, Los Angeles, California

Charles W. Fricke, Judge, June 10th, 1937

Mr. Charles Hope, Box 59865, San Quentin, California.

Dear Sir:

I received your letter, but your problem is one in which I cannot act to represent you, as I was the Judge in the

case, and your personal problems will have to be handled through an attorney.

Yours truly, Charles W. Fricke.

CDF:MTD.

[fol. 2493] If it be further said that these affidavits are not admissible on Petition for Rehearing, we respectfully submit that we are also filing with this Honorable Court a Petition for a Writ of Habeas Corpus, under authority of Mooney v. Holohan, 294 U. S. 103, and respectfully request that these affidavits be considered upon the Petition of said Writ and as a part thereof, in order that a corrective judicial process to remedy the wrong, if constitutional rights are not to be impaired, may be invoked to set aside a conviction, based upon perjured testimony later discovered, but not too late, and still within the power and jurisdiction of this Honorable Court to remedy.

We however respectfully call the attention of this Honorable Court to the language of Article VI, Section 4¾ of the Constitution of California, which authorizes the taking of evidence by Courts of Appellate Jurisdiction under circumstances therein set forth, and concludes:

"The Legislature may also grant to any Court of appellate jurisdiction the power, in its discretion, for the purpose of making such findings or for any other purpose in the interest of justice, to take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and to give or direct the entry of any judgment or order and to make such further or other order as the [fol. 2494] case may require. (New Section adopted November 2, 1926.)

Pursuant thereto, Section 956 A of the Civil Code was adopted and such section gives Appellate Courts the authority to take additional evidence at any time prior to the decision of the appeal 'for any other purpose in the interests of justice."

Rule XXXVIII provides the authority for this court, upon application to this court for leave to produce such additional evidence.

We herewith submit a certified copy of the affidavits made by Hope in the Superior Court, and ask leave of this court

to present such testimony and prove the facts set forth in this Honorable Court.

[fol. 2495] V

That Alleged Evidence of Another Purported Offense in Another State was Presented in the Trial of this Case, without any Indictment, Information or Judgment thereon and without Any Jurisdiction of the California Court of the Subject Matter Therein, and that Said Use of Said Testimony Placed the Defendant upon Trial in California before a California Jury on Such Purported Offense, and is in Violation of Due Process of Law, Guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The people of the State of California, with their processes and finances brought several witnesses from the State of Colorado and extensively introduced evidence regarding the death of Winona James, a former wife, whom they alleged that he murdered in 1932. No accusation was furnished the accused; no notice was given, and no opportunity was occasioned to be heard in reply, because the processes of the State of California do not extend to Colorado. Nor was the defendant given any continuance or opportunity to get counter testimony which it appears was available, were the opportunity accorded to appellant.

Notice of a charge one has to meet, and an opportunity to meet it, are elemental principles of due process of law, guaranteed by the Fourteenth Amendment to the Constitution of the United States, and a denial of them to the accused was a denial of rights guaranteed by the Federal [fol. 2496] Constitution. Nor were the processes of the California Courts available.

As pointed out in the dissenting opinion of Mr. Justice Seawell in People v. Lisenba:

"The admissibility and sufficiency of the evidence admitted to prove that the death of Winona, which occurred in the state of Colorado in 1932, was accomplished by the felonious and premeditated act of the defendant, waiving the reasonable doubt doctrine, depends upon the further question as to whether it satisfied the rule which provides that such evidence cannot be admitted if in character it is so vague, uncertain or unsubstantial as merely to create a suspicion of guilt. Defendant further objected to an offer

of proof of the other alleged crime claimed to have been committed in another jurisdiction distant more than a thousand miles from the place of trial and invoked the common law and statutory rights which vouchsafe the right of an accused to be tried in the county in which the crime was committed. The ancient right cannot be denied in a case where punishment is to be imposed for the specific offense charge in the indictment or information. The right does not exist where the evidence of another crime is limited in its probative scope and effect to the purposes heretofore defined. The appellant complains that great distance from [fol. 2497] the situs of the offense deprives the accused in many cases of the means of discovering evidence material to his defense and, in effect, amounts to a denial of the process of the court to compel the attendance of witnesses in his behalf. Cal. Const., art. 1, § 13. The point urged is illustrated by a matter which arose at the trial of the instant case. J. D. Rogers, the superintendent of Pike's Peak Auto Highway, a private enterprise, was brought from Colorado as a witness on behalf of the state. He testified that, upon his arrival at the scene where Winona James was injured and in attempting to ascertain whether she was breathing, he placed his head near her mouth and detected a strong odor of liquor on her breath. This evidence furnished support to the prosecution's argument to the jury that James had made her drunk before the automobile crash. This evidence would not have ordinarily been anticipated by the defendant in advance of trial, a contingency which frequently arises in the trial of cases. The appellant brought to the court's attention the fact that a letter had been recently delivered to him at the county jail, written by a party or parties in Colorado, outside the jurisdiction, who met and talked with Mr. and Mrs. James at the top of Pike's [fol. 2498] Peak a short time before they started down the mountain stating they could and would testify that there was no evidence or indication that either Mrs. James or James was affected by liquor. It appears from the discussion between court and counsel that the named party volunteering the information by letter and counsel for defense were acting in good faith in the matter, and counsel, in asking the process of the court to produce the evidence by deposition or otherwise, was not derelict in disclosing the information. A continuance was moved that the deposition of said person might be taken to show that Mrs. James was

sober and in a normal condition a short time before she received said injuries. No formal motion having been made by way of affidavit, the court denied the motion for a continuance for the purpose stated. The motion was renewed when the assistant district attorney in his argument severely arraigned the defendant for preparing his wife for death through the means of intoxicating liquor. It is so obvious as not to require more than a mention of the proposition that, in circumstances where the means of communication or opportunity for investigation and preparation for a defense and all the other recognized advantages which local contacts afford, are made difficult or inaccessible [fol. 2499] to the person placed on trial for a crime committed far distant from the place of the trial, every opportunity should be liberally extended to enable such person to meet any surprise evidence or unforseeable situation arising at the trial, even at the cost of a continuance. The importance of the testimony of the two Colorado persons who offered to testify in rebuttal of the Rogers' evidence as to the sobriety of Mrs. James is given added emphasis by the prominence this court has given to the issue in its opinion herein as well as that given to said issue by the prosecution in argument to the jury."

[fol. 2500] That the use of this testimony was a denial of due process is shown by the fact that much of the argument of the prosecutor is taken up with this other unalleged case and much of the testimony and opinion are devoted to it.

It was a denial of due process to have sat in the courtroom through the weary days of the prolonged trial; to have listened day after day to the testimony of witnesses brought from a distance of 1500 miles at the expense of the State for the purpose of giving testimony which, whether true or false, was not within the power of the defendant to rebut; to have listened while such witnesses, presumably honest and truthful, but to one experienced in such matters, clearly biased in favor of the side that produced them; to have listened day after weary day to the gruesome description of injuries suffered by a woman to whom death must have come as a merciful release; to have heard the circumstances of that most unfortunate accident, not merely related in harrowing detail, but obviously distorted by memories weakened by the lapse of years and distorted to the injury of this appellant; to have seen those

circumstances presented in a false perspective and "trifles light as air" gravely presented as "confirmation strong as proof of holy writ"; the evidence as to the injuries sustained by his former wife consists of circumstan*f*es, most of which have been reasonably explained. The most significant circumstances are that if he had inflicted her [fol. 2501] injuries in an attempt to kill her, every motive of self interest would have prompted him to complete the crime instead of going several miles to secure aid for the injured woman. The theory of the prosecution was that he first struck her in the back of the head with a blood-stained hammer. This theory is utterly dispelled by the fact that bits of granite were found imbedded in this wound and that the blood stains upon the hammer attest an innocent accident is shown by the presence of the hammer at the scene of the injury. The defendant would have thrown it amongst the rocks and boulders which the photographs show scattered over the hillside. Finally, he and his wife continued living together harmoniously after she regained consciousness and although she was in the hospital for several days and talked with many people, there was never the hint of an accusation against her husband.

That the evidence of these wounds and the sight of the rattlesnakes in the courtroom were controlling influences in bringing about the verdict does not admit of a question. Appellant was tried more largely for the murder of Winona James in Colorado than for the murder of Mary James in California. The Court cannot, read the closing argument of the prosecution without perceiving how very prejudicial to the appellant the production of this evidence was. Yet Winona James did not meet her death as the result of these injuries. She was drowned in the bath tub of the [fol. 2502] James residence. She was found dead there when James, who had been in Colorado Springs on business, returned. The distance from Colorado Springs to Manitou Springs, where James and his wife were then living, is six miles. The distance from the store to the James residence was approximately one mile. James was seen in Colorado Springs about 4:00 o'clock in the afternoon and the delivery boy from the grocery store was with him at 5:00 o'clock when the body was discovered. For James to have walked between the two places in the time is an impossibility. For him to have traveled by stage

between the two, to have gone to his residence, committed the murder, returned to the store, if not an utter impossibility, scarcely lay within the possibility of human accomplishment.

We are transcending the limits we had set for this branch of our argument. We have in mind the long line of cases of which In Re Cohen, 6 Cal. 318 is an example. We refrain from citing any of the long list of cases in which this court had held that slight error is sufficient in such unsatisfactory state of the record to necessitate a reversal, [fol. 2503] except the single one of People v. Tapia, 131 Cal. 647, but we do say that we are unable to reconcile the decision in this case with those that have stood unquestioned almost from the organization of this court down to the present time.

In Powell v. Alabama, 287 U. S. 45; 84 A. L. R. 527, the court quotes with approval Com. v. O'Keefe, 298 Pa. 169, 173, 148 Atl. 73, as follows:

"It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts of the case."

We respectfully submit, therefore, that the use of this testimony was a denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

With respect to the decision rendered in rehearing, the court has criticised counsel for the defendant for not having raised a question as to the soundness of a certain instruction until after petition for rehearing was granted. It was our understanding that the granting of such petition reopened the entire case. It is true that we ought to have [fol. 2504] discovered the error in this instruction sooner that we did. We ourselves were the first to voice the criticism of the fact. That we did not discharge our duty as we should have done, does not in any way militate against the gravity of the error.

The court has said that we complain only of the opening sentence. If the court will read our briefs more carefully the court will find that we have complained of the entire instruction as a vicious argument against the defendant, the throwing of the weight of judicial influence against him, and have referred to the case of People v. Maughs, 149

Cal. 253 as being the case in which the judicial influence was exerted more fully. But we protest that the court itself has fallen into error when it says that because correct instructions were given elsewhere, the man could not be injured by the erroneous instruction to which we refer. As we read the latest expression of the court, the instruction which we attack is erroneous. If it be erroneous and the jury followed it, then this defendant's life has been taken as the result of the error. If correct instructions were given elsewhere, how can this court tell which the jury believed. It could not follow inconsistent instructions. Heretofore the rule has been uniform that while the instructions must be taken as a whole and if so taken can be construed together so that what is omitted in one is supplied elsewhere, the instructions will be consistent. It has never been held by this court before that where one part [fol. 2505] of the instructions is absolutely inconsistent with another that the incorrect instruction may be disregarded. We view with apprehension the future liberties of innocent men accused of crime in a State where such a rule can prevail. May we, without disrespect to the court, urge once more that expression of the court to which we refer is opposed to an unbroken line of its decisions to the contrary. No useful purpose would be served in repeating those cases now. They are cited in the supplemental brief and our examination has revealed the rule to be one of universal application.

[fol. 2506] VI

That Major Raymond Lisenba was unlawfully imprisoned and isolated in a private building for three nights and days, before being lodged in any jail; that he was then held practically incommunicado for eleven days, and almost incessantly questioned by officers until the alleged confession was given, and that the use thereof in evidence at the trial was in violation of due process of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

What took place during the period while Lisenba was being secretly held by the officer, the unceasing questioning, the beatings and brutality, the wearing down of the victim's physical strength and morale are matters which are presented elsewhere; also similar subjects as to the

treatment administered to Lisenba after being lodged in jail are argued under appropriate assignments.

Here, the contention is presented that the procedure followed was not only a violation of the law in such case made and provided, but constitutes a violation of both the State and Federal Constitutions which guarantee due process.

In People v. Dye, 119 Cal. App. 262, it was declared: "The right of the accused in a given case to a fair trial, conducted substantially according to law, *is at the same time the right of all inhabitants of the country to protection against procedure* which might at some time illegally deprive them of [fol. 2507] life or liberty."

The opinion quotes People v. O'Bryan, 165 Cal. 55 as follows: "It is an essential part of justice that the question of guilt or innocence shall be determined, *by an orderly legal procedure*, in which the substantial rights belonging to defendants shall be respected," citing People v. Wilson, 23 Cal. App. 513.

Justice Seawell, in his dissenting opinion, recognizes that Article 1, Sec. 19 of the State Constitution was violated by the unlawful procedure here shown to have been followed, but, we believe, mistakenly admits that no applicable remedy exists of which the appellant herein could avail himself.

Surely, since the sole object of the prosecutor and his officers in having violated the law and denied the accused his constitutional rights was to force from him a pseudo confession to be used as the chief instrumentality to later, on trial, deprive him of his life, the remedy for this palpable wrong lies in barring the pretended confession.

True the law denounces the admitted acts of the officers as criminal and provides fines and imprisonment as penalties. True, the fact that although such criminal acts were openly admitted and no action has been taken to punish the flagrant offenses, still the fact that offenders might be punished would be no remedy for appellant's wrong.

[fol. 2508] But substantial remedies do exist. If it be conceded that because of the fact that the substantial rights of the defendant were not respected, and the orderly legal procedure was not followed, and that the procedure which was followed prior to the trial was not "substantially according to law it results that the conviction of the accused was violative of the due process clauses of our Federal Con-

stitution, and Article I, Section 19 of our State Constitution.

If such violation is shown the conviction cannot be upheld. The judgment must be reversed, because it becomes void under the due process clause of our Federal Constitution, Fourteenth Amendment. A new trial is the right of the appellant, at which the fruits of the illegal procedure must be barred and in which the minds of the jurors will not be poisoned and inflamed by an alleged confession obtained through the barbarous defiance of the rights of persons accused of crime as recognized in all civilized countries.

Without the necessity of reliance upon the common law and the decisions of courts of other jurisdictions from time immemorial we need only point to the laws of California, and to the Constitution of the United States, Fourteenth Amendment, to show the undisputed violations of appellant's rights herein.

Justice Seawell said, reference being to officer Southard:

[fol. 2509] "His act was inexcusable and was in violation of section 149 of the Penal Code, which provides that every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years."

Southard admitted assaulting Lizenba while questioning him about the charge of murder. Justice Seawell appeared certain sections of the Penal Code to this case in apt judicial language as follows:

"The alleged confession began to break, after days of unremitting effort, at 1:45 in the morning. No one, not even Mr. Silverman, the defendant's attorney, or Mr. Parsons, had knowledge of the place in which the defendant was held in private custody by the investigators. Neither his friends, relatives nor the public knew the place of detention. No warrant of arrest had issued and there was no public record, or any record, which would enable anyone not a member of the staff of investigators to know of or discover the presence of defendant.

The law prescribes the places in which persons charged with crime may be detained. A private house located in a

residential part of a city and not complying with the provisions of law prescribing the purpose and use of county jails and their management, is not a place where persons charged or suspected of crime may be lawfully detained. [fol. 2510] Grave abuses may be practiced against persons thus illegally held in secret confinement. Pen. Code, 1597 et seq. Every police officer who, having arrested any person upon a criminal charge, wilfully delays taking such person — a magistrate for examination is guilty of a misdemeanor. Section 145, Pen. Code. In the instant case the defendant was held in custody seventeen days without the issuance of a warrant and without being taken before a body which had power to examine the offense with which he was finally charged. He requested that his attorneys, first Mr. S. J. Silverman, whom the district attorney had reported out of the city for the week-end, and then Mr. R. E. Parsons be contacted. Neither appearing to be immediately available, the inquisition, in which a number of the investigators took part, was vigorously and unremittingly pressed, without delay, through many hours. It was not a proceeding authorized by a statute and no sufficient reason was or could be shown why the request of defendant for advice of counsel, a right guaranteed by the Constitution and by statute to every person charged with crime, was not complied with. Section 849 of the Penal Code provides: "When an arrest is made without a warrant by a peace-officer * * * the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and *in* information, stating the charge against the [fol. 2511] person, must be laid before the magistrate." Section 859, following the procedure above cited, provides that the magistrate must allow the defendant a reasonable time to send for counsel and may postpone the examination for that purpose. Upon *request* of the defendant the magistrate *must* require a peace officer to take a message to any counsel in the township without delay and without fee. These and other provisions of the statute cannot be circumvented by resorting to any methods which tend to deny the rights and protection which the law guarantees to every person charged with a crime. The statutes impose quite substantial fines and terms of imprisonment upon peace officers for the willful disregard of their duties. Pen. Code, 145, 147 and 149."

The facts concerning the procedure followed by the prosecutor and his aides was so flagrantly illegal that it cannot be questioned that this court, as constituted when the decisions were made in People v. Dye and People v. O'Bryan, both supra, would have unhesitatingly held that Art. VI., Section 4½ of the State Constitution had been violated. That the Prosecutor did not pursue "an orderly procedure" is recognized and deplored by the opinion of the court affirming the judgment herein; from what is there recited and said it is clear that the defendant was not protected "against procedure which might at some time illegally deprive them, the citizens, of life and liberty."

This illegal procedure has deprived this petitioner of his liberty; it will deprive him of his life, if this judgment is [fol. 2512] allowed to stand, because through the use of a so-called confession obtained through a course of coercion which would have made the inquisitors of the days of Magna Charter and the Bill of Rights blush because of its superiority in technique to their methods, a conviction has been obtained and a death sentence has been pronounced.

Under the Fourteenth Amendment to the Federal Constitution it has become the settled law that evidence procured by an unlawful seizure is barred from use against a defendant. (Olmstead v. U. S. 277 U. S. 438, 72 L. Ed. 944.)

The basic reasoning of that decision cannot be distinguished from that necessarily resulting through the application of logic where, as here, grossly illegal means are employed to secure an alleged confession from a helpless and tortured citizen accused of murder.

To say that although the fact is admitted that such methods were employed several days before the statement actually given to the jury was made, that statement was freely given because just before it was finally made no one struck the accused or threatened him is begging the question. The evidence showed, as Justice Seawell declared, that the questioning was almost "incessant" even after the defendant was lodged in jail and up to almost the moment that the final statement was made. The evidence was overwhelming, which was recited by the dissenting opinion, although not commented on in the opinion of the [fol. 2513] court herein, that Lisenba was mistreated while in jail. A prosecutor, using the same evidence against an accused, would have ridiculed a defense counsel who would

have denied that such mistreatment had occurred and the incessant questioning was admitted.

If this conviction, burdened with a judicial approval of the illegal procedure here employed, is to establish the law in this state, it must become a menace to the liberty and life of every citizen, for any person, no matter how innocent, may sometimes be accused of the grossest crime.

[fol. 2514] VII

That the Repeated Taking of Defendant Lisenba from Jail without his Attorney and against His Consent and to the Office of the District Attorney and other Places and after Prolonged Questioning without Food and without Rest and thereafter Extorting a Purported Confession which was used in the Case against Appellant was in Violation of Due Process of Law Guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Due process of law requires that a defendant be represented by counsel at all stages of his case and that it be counsel of his own choice. Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158; 84 S. L. R. 527; Jones v. Commonwealth of Kentucky, 97 F. (2) 335. The appellant after finally being lodged in jail, on a charge of murder without bail, could not be removed therefrom without an appropriate order of court without the officers thus taking him being guilty of an "escape" under Section 1600 of the Penal Code.

He was entitled to remain in jail unmolested and he was entitled to be represented by counsel. He did have an attorney, Mr. Silverman, who conferred with him. Without the knowledge or consent of the attorney representing him he was forcibly taken out of the jail to the district attorney's office and there he was questioned from early morning until the next morning. He was denied the right of counsel, a right guaranteed under the Fourteenth Amend-
[fol. 2515] ment, at every stage of the proceedings. His right to be free from questioning or molestation by any one after being committed to jail awaiting trial and before conviction, is certainly a constitutional right of every person accused of, but still presumed innocent of any crime until convicted by a jury.

We contend that such procedure violated due process under the Fourteenth Amendment to the Constitution of the United States.

[fol. 2516] Conclusion

Three learned and eminent justices of this Honorable Court have to date expressed their views that grave errors, requiring a reversal of the judgment occurred in the trial of this case.

We now ask this court to determine whether, under the rights guaranteed by the Constitution of the United States the Appellant has been denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, upon each of the grounds hereinbefore enumerated.

In the view which we take of the matter, the life of the Appellant is the least important thing involved here. The preservation of those principles guaranteed by the Fourteenth Amendment to the Constitution of the United States that have been proved by the universal experience of mankind and that have been thought to have become a part of the fabric of our Government; the maintenance of that uniformity of decision which lends stability to the administration of justice; the retention of confidence in the judicial branch of the State Government as rising above the passions and prejudices that sway the mind and control the actions of the populace—these transcend in value the life of any man. Because we think that the decision in this case is inconsistent with those principles guaranteed by the Fourteenth Amendment; that it destroys the uniformity of decision heretofore maintained; that it constitutes a depar-[fol. 2517] ture from the current of judicial decision in this State and of the United States; that it rests upon a foundation so unsecure that it is difficult for the mind to be satisfied with it, are reasons that impel us to direct the attention of the Court to the Constitution of the United States, the Fourteenth Amendment, and the sacred rights guaranteed thereby and to have this court rule now whether those rights have been denied or abridged in violation thereof.

These rights involved are the right to have a trial free from the venom of rattlesnakes hissing ominously at the jury and the passion and prejudice engendered thereby; the right to be free from third degree brutal methods and unlawful seizure, and the use of a purported confession obtained thereby; the right to be free from the mental torture of sleepless days and nights and under such duress securing of statements which were used against appellant;

the right to be free from a conviction based upon perjured testimony; the right to be placed upon trial only upon a charge contained in the indictment and not upon one in another state where one has no notice of the same or opportunity to meet it, and without the processes of the court to bring witnesses before it to rebut this improper testimony. That under these circumstances a trial and conviction based thereon are violative of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, the Supreme law of the land.

[fol. 2518] This is a case of circumstantial evidence in which there is no important circumstance proved against the defendant by any credible evidence. The alleged confession, extorted under brutal, third-degree methods, which has been relied upon as an instrument of his destruction, is characterized by the prosecution as a pack of lies. The testimony of Hope involves physical impossibilities, is inherently incredible and proceeds from a man of a character so low that the prosecutor should have considered well whether he had a moral right to ask a jury to rely upon it.

While it seems unthinkable that the life of one human being should be adjudged to be taken through the use of the high-handed procedure used by the State and the instrumentality of the incompetent and false evidence placed before the jury in this case, the enormity of the wrong which will result should the judgment herein be executed lies in the fact that a precedent would thereby be estab-
[fol. 2519] lished, judicially condoning and approving the use of the most extreme and illegal third-degree methods by law enforcement officers to obtain convictions and endangering the liberty and life of every citizen or resident of California, whether guilty or innocent of wrong doing, and compelling the unrelenting and blind enforcement of such judgment, regardless of the fact that the testimony upon which the conviction has been secured is thereafter shown to have been perjured.

To have seen the District Attorney stand sponsor for the wholly unreliable testimony of that abject wretch Charles Hope, whose polluted lips are incapable of speaking the truth and who has since branded his testimony as false, and whose perverted moral sense makes him a willing instrument for the taking of any life by any means; to have listened to the fantastic incredible testimony of this abandoned wretch and then at the psychological moment, at the

time when their production was necessary to distract attention from the inherent weakness of his testimony, to have seen two live rattlesnakes carried down the aisle, sounding their ominous warning, while spectators gasp and a visible wave of terror sweeps over the court room; sounding not only their warning but the doom of this appellant; to have seen every prejudicial circumstance that could be dragged into light, however trivial it might be, brought forward and received as evidence against appellant; to have listened to [fol. 2520] the testimony of a paid medical expert witness whose conscience must have shuddered at the testimony he gave; to have listened to another such witness while he was permitted over all objection to wander into the dim paths of conjecture, all this was to undergo an experience of which the cold record presents only a vague shadow, and all of which was in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Wherefore, appellant prays for rehearing of the cause, and reversal of the judgment and of the order denying a new trial, so that defendant may be tried under due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States, and in order that it may be fully determined whether the testimony of Hope, given in the first trial, was perjury.

Appellant further prays that in the event this court does not reverse the order denying a new trial, that a reference be appointed to take further testimony regarding the case.

Appellant further moves and prays that this court receive in evidence pursuant to Article VI, Sec. 4¾ of the Constitution, 956a of the Code of Civil procedure, and Rule 38 of the Supreme Court, the certified copies of the affidavits and letter of Charles H. Hope, received by the Superior Court of Los Angeles County since the trial of the case. [fol. 2521] Appellant further prays that in event this motion and prayer are denied, that a reference be appointed for the further taking of testimony of Charles H. Hope, and for the ascertainment of the true facts regarding whether this conviction is based both on perjured testimony and upon conduct in violation of the defendant's rights of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Fortunately, the corrective processes of the State, referred to by the United States Supreme Court in Mooney v.

Holohan, 294 U. S. 103, and in Jones v. Commonwealth of Ky., 97 F. (2d) 335, are still open to do justice in this case in accordance with the law of the land guaranteed by our Fourteenth Amendment.

Respectfully submitted, Morris Lavine, Wm. J. Clark,
By Morris Lavine, Attorneys for Appellant.

[fol. 2522] Received Copy of within document, Oct. 25, 1939, Earl Warren, Atty. General, by Warner Q. Praul, Deputy.

[fol. 2523] In Superior Court of Los Angeles County

No. C-64218

The People of the State of California, Plaintiff,

vs.

Major Raymond Lisenba, Also Known as, Robert James, and Charles H. Hope, Defendants

Affidavit and Motion of Charles H. Hope to Withdraw Plea of "Guilty", and for an Order of Court Setting Aside Judgment, and an Order Granting a New Trial

State of California,
County of Marin, ss:

Charles H. Hope, being first duly sworn, deposes and says:

1. I am the defendant, Charles H. Hope, named in the above-entitled action, now imprisoned in the State Prison at San Quentin, under a judgment of the above-entitled Superior Court finding me guilty, upon my plea of "guilty", in the above-entitled matter; that I was not, and am not guilty of the crime of murder or any other crime, and that said judgment against me is void, because of fraud practiced upon me by the prosecuting officials of the State of California in inducing me to enter a plea of "guilty", under [fol. 2524] a misapprehension of facts by which my legal right to defend *a* was taken from me by a specie of fraud, all as hereinafter set forth. That I make this affidavit, to lay the foundation for a motion in said court to set aside said judgment and to permit me to withdraw said plea of

"guilty", and to enter my plea of "Not Guilty" and to defend said charge on the merits.

2. Affiant avers that he has read and studied the opinions of the Supreme Court of California, in People v. Lisenba, the above-named joint defendant, 97 Cal. Dec. 378, and is convinced from a reading thereof, especially of the dissenting opinions in said case upon which a rehearing has been granted as affiant is informed, that much of the same applies to the facts of his situation and that he is not bound in law by the confessions, statements and testimony forced from him under the circumstances hereinafter related and that it is his privilege and right, in the interest of justice, to repudiate and retract same, and that your affiant does now wholly repudiate and retract any and all statements, alleged confessions, and testimony given by him upon the trial or any other place in connection with the above-entitled matter and proceedings, as not having been free and voluntary, and as having been induced by the fraud, duress, fear, coercion and threats, and false promises of the District Attorney, his deputies and investigators of which affiant will offer testimony in open court upon the hearing of this Motion.

3. Affiant avers that from the very inception of said pro-[fol. 2525] ceedings, from the time of his arrest on continuously throughout the trial and until very recently, he has been and was subjected by the investigators and deputies of the district attorney's office of Los Angeles County, acting for said Plaintiff State, as officials of such, to a constant pressure of fear and threats, and that he was induced by said fear and threats and by false promises to make the statements and to give the testimony against himself and co-defendant which he did give; that from the very moment of his arrest, your affiant protested his innocence and stated that he was not conscious of having commited any crime or having done anything wrong, but that for nearly eighteen (18) days after his arrest and before any attorney was secured or allowed to consult with him, he was held in the private custody of the officers and investigators of the said plaintiff, incommunicado, that he requested an attorney and was refused the right to an attorney and was not allowed to see one; that during that time he was subjected to a constant grilling and drilling in the story which said deputies

of the State wanted him to tell; that all of said testimony so given on the trial was by them carefully rehearsed by them to him and he was induced by threats and false promises so to testify. That your affiant is now informed that under the decision in Peo. v. Lisenba, 97 Cal. Dec. 378, the refusal to allow him counsel at that state of the proceedings, when the guilt or innocence was being decided, in the most important preliminary steps, so illegally conducted by the prosecuting [fol. 2526] officials as aforesaid, such refusal of counsel violated his rights under the Statutes and Constitutions and render such statements, admissions and testimony incompetent and inadmissible against him. That it is his desire to and he does hereby repudiate and retract same "*in toto*," that is to say, in whole and not in part.

4. Affiant avers that during said eighteen days, after his arrest, when such statements were being extorted and such agreement to testify being forced upon him, he was taken to the office of the District Attorney, who threatened him in these words:

"If You Don't Co-operate with Us, Tell the Truth as It Is, *I Will Frame You if I Have to.*"

That said District Attorney (Mr. Buron Fitts) then and there shook his fist in my face and told me if I did not co-operate he would get me if he had to frame me. That your affiant believed said threats and was greatly put in fear thereby, to such an extent, your affiant avers, that his free will and agency were completely destroyed, and he thereafter did as he was bid to do by said prosecuting officials, that is to say, did enter the said plea of guilty, although he was not in fact guilty, and did testify as he was told to by said prosecuting officials, the same being the testimony given by him on the trial.

5. That at said time and place, said district attorney further threatened your affiant, "I'll try you with him and I'll hang you with him if you don't do as you're told." The [fol. 2527] above in his office during the investigation. When I asked to see a lawyer, they refused, and said they would get the public defender to represent him, as they said they could "co-operate." That this constituted the use of force or offer of force and violence against me. Mr. Robert Stewart, then a deputy district attorney, then present at one such meeting, told Mr. Fitts in my presence, "You

would rather have this case at this time before election than anything on earth. *Stop threatening* the man and listen to him."

6. Affiant further avers that he was induced to enter said plea of guilty by the above mentioned threats and fear, and by the false promises and false representations on the part of the district attorney made to affiant that if he would enter said plea of "guilty", it would be a mere matter of form, and that after the James trial was out of the way, they would then extend him leniency and recommend same and that they would allow the court to hear and decide from affiant's evidence that affiant had not been guilty of any crime, or if he had become involved in some unknown manner in not fully or properly reporting his knowledge, that he would be found guilty of such minor misdemeanor only, and that he would be given full opportunity to defend and present any and all evidence; that affiant did not understand that he was entering a plea of Guilty to Murder in any degree or to homicide in any degree; that your affiant was not and is not guilty of murder or manslaughter, either as a principal or accessory before or after the fact, and that [fol. 2528] whatever he did he did in good faith and without criminal intent and without knowledge of wrong doing if there was any, which is the substance of his repeated statements to the district attorney and upon the basis of which it was agreed between the parties that the court should enter its decision; that it was never in contemplation of affiant's mind that he would plead guilty to murder or be found guilty thereof. That said promises and agreements were believed and relied upon by affiant; that they were false, were known to be false by the district attorney and his agents and were knowingly made with the intent to deceive and mislead this affiant and to induce him to enter said plea of guilty, and that the same did have that effect. That upon the conclusion of James trial, your affiant was given no opportunity to Defend such as he had anticipated and as he had been promised; the foregoing promises were broken and your affiant was summarily found guilty of murder in the first degree and thereafter sentenced for same. That the foregoing facts and other facts which affiant will adduce in support hereof constitute fraud on the part of the prosecuting officials and render said plea and judgment void.

7. That the illegality of the proceedings, the violation of the numerous criminal statutes and clauses of the Constitution for protection of citizens placed as defendants on trial, and knowingly and wilfully compelling both defendants to give false testimony against themselves has been pointed out by the Supreme Court of this State in the decisions in the case above mentioned Peo. vs. Lisenba, and [fol. 2529] that the same apply to your affiant, and your affiant makes all of same a part hereof by express reference in this behalf, as showing a scheme and general plan of action on the part of the prosecuting officials themselves, which render the same admissible, under the same theory which they used to introduce incompetent and inadmissible evidence of previous alleged "crimes" of like nature against co-defendant of your affiant.

8. That ever since the consummation of said fraud as aforesaid, your affiant has been as "the voice of one crying in the wilderness", that he was unjustly and fraudulently convicted of a crime which he did not commit, if any crime was committed by any one; and in this behalf, affiant avers that he was acting under stress of hysteria and excitement, threats and fear at the time of the trial, but that subsequent reflection has lead him to the believe that his co-defendant James was in such a condition of mind as to be temporarily incompetent whether from alcohol or otherwise, and his evidence hence of no value, (Mythomania) at the time James found the dead body of his wife, following a long series of attempts on her own part to commit the crime and wrong of Abortion or infanticide (murder of baby) and as a direct result of the effect of the drastic medicines and methods resorted to by her to that end which unfortunate misdirection of mind on her part has caused suspicion to point to those who were in contact with her; that your affiant does not believe that defendant James was capable of under- [fol. 2530] standing what he was saying or doing, due to intoxication and mental condition then present, and his statements were of no evidentiary value and were not believed by me; that your affiant has no personal knowledge as to whether or not a crime was committed by any one except the decedent, who, according to testimony, was engaged in attempted abortion of herself, a very dangerous thing, especially if followed by a bath and severe hemorrhages followed by sudden heart failure; whether or not she

drowned herself was drowned accident-lly, affiant does not of his own knowledge know and upon a new trial he will contest the right of the state to introduce any statements or testimony of alleged confessions or testimony on the previous trial, and will put the State to their proof, believing that they have no evidence and can produce none sufficient to justify this case being given to a jury. That the course of action described in Dissenting Opinion of the Supreme Court, as to the building-up of a case by over-zealous and ambitious officials, who had created a certain theory in their own imagination, and then sought to compel affiant and others to give false testimony to fit that vision, affiant avers to be true in fact.

Specific Accusation and Complaint Against State Prosecuting Officials (District Attorney and Men) for "Willful or Corrupt Misconduct in Office" Under Sections 658 and Section 771, inclusive, of the Penal Code of California.

[fol. 2531] 8-A. Affiant Charles H. Hope further specifically avers that in the "statement" filed by the district attorney on file in this case it is said: "Hope, (affiant herein), was an accomplice of Major Raymond Lisenba, in an effort to kill Lisenba's wife by rattlesnake poison, *although this method of killing the wife failed*, Lisenba completed the job by drowning her in a bath tub." affiant avers that the decisions of the courts hold, and it is the law, that where an alleged attempt to murder fails, and where death ensues not from such attempt but from supervening or subsequent causes, or a separate and independent assault with which the accused had no connection and no participation, or knowledge or intent and no pre-conceived design, it is a good defense entitling him to an acquittal. That before the jury and court were justified in finding affiant guilty of murder in the first degree, as the court did find this affiant so guilty upon his plea of guilty to whatever crime the evidence might show and not his plea of guilty to murder as has been falsely shown by the record, due to a mistake of fact, it was incumbent upon the state to prove beyond a reasonable doubt that the alleged attempt against life by rattlesnakes caused the death, and that said rattlesnakes were not merely on the premises, but that they actually struck and bit the deceased infecting her with fatal poison, proven beyond a reasonable doubt as a cause

of death. If doubt existed, affiant was entitled to an acquittal. Affiant accordingly avers that the procurement of false testimony by the state, knowingly and willfully that [fol. 2532] the rattlesnakes had bit the deceased, when as a matter of fact affiant refused to so testify and said that that story was all "bunk" or untrue, was very material matter, which the state prosecution officials know and knew to be false, under secs. 127, 128 Penal Code.

8-B. Affiant avers that this issue, this theory of the prosecution of death by rattlesnakes was and is a false one and was known to the state prosecuting officials to be false; that for many days prior to the James trial, affiant was subjected to a constant gruelling by the district attorney and his staff of investigators, in which he was solicited, procured and requested to falsely testify against his will and wish for and on behalf of the State to the rattlesnake fiction or story now of "Macbeth hellish brew of the dancing witches" fame, Vol. 97 Cal. Dec. at p. 463, Peo. v. Lisenba, this case due to such characterization by the classic or classical opinions of the Supreme Court of California, a part of the law of this case, of which this court must take judicial notice and knowledge; affiant avers that prior to taking the stand he at all times told the said state prosecuting officials C. H. among them Messrs. Buron Fitts, Bob Stewart, Scott Littleton, Jack Southard, and others mentioned in the transcript of the trial as being present, to which reference is hereby made for further particulars, that to his knowledge no rattlesnake ever bit or poisoned James' wife; but notwithstanding their knowledge of the falsity of same, said state prosecuting officials did coerce [fol. 2533] and compel this affiant, by threats of framing him and hanging him, and by intimidation as well as by false promises of immunity and release, too numerous to mention, to testify falsely that the rattlesnakes of the district attorney's creation had in fact struck at, bit and poisoned the James wife, in the presence and seeing of affiant; affiant will restate this elsewhere in his affidavits, to supply other elements to make it clearer.

Affiant here avers in the first person:

I was held incommunicado in Glendale, brought from there to Grand Jury room (had never seen a lawyer) and told by Jack Southard that I would be told in the

"room" that I had rights but that I had better disregard that and tell the story that they had given me and that had been gone over by them with me *hundreds of times.* (See p. 421, of Peo. v. Lisenba, 97 Cal. Dec. 421); also to say that I had not discussed what I proposed to testify to with any one, also to say that I had not been promised anything, the state prosecuting officials well knowing all this to be false and untrue.

Affiant further avers in the first person:

"During James trial as I was preparing to take the stand, Southard told me it was *absolutely necessary* to say I saw the snake bite the woman, I refused. He said I would at least have to say the snake struck at the woman. He explaining that I should say this and not that I did not know. He further stated to me, 'You'd Better! You're Not Out of This Yourself Yet.'"

[fol. 2534] "The further part of the District Attorney in not allowing my day in court and setting degree after my plea without defense promised and until after I had testified and holding a death threat over me if I did not.

I hope this makes it more clear. However, the thing is simply this as far as I'm concerned,—*all its doctrines were conceived in error, founded on fallacy, propogated by falsehood, and are, in short, puerile, idiotic and utterly asinine.*

(Copies from Memorandum to Scribe in my own handwriting May 11, 1939.)

Affiant will ask leave of court for a continuance for time within which to prepare and file his evidence as to the false promises operating upon the entry of plea of guilty and upon procuring of the false testimony on the trial, as his present time and situation, without private counsel, necessitates. Suffice it to say that this pretense of friendship for affiant and his wife extended throughout the conversations and contacts and proceedings both before and upon and after the trial and up until a very recent date, and said promises and agreements were tantamount to assuring this affiant that he would be found guilty of a minor misdemeanor, or after the surprise conviction resulted, the story was adapted to the situation to include an immediate commutation of sentence or pardon as soon as the case should be settled in the Supreme Court and James hanged. They promised but failed, to take the stand in my

C. H. Hope

[fol. 2535] defense. ~~Promises extended to assistance to~~

C. H. Hope

~~the family of your affiant, and lucrative employment.~~ That none of said promises were ever kept; that they were wholly false, made in bad faith, and were elements of deception and fraud entering into the trial and proceedings above mentioned. "A bill of particulars" will be furnished any one on request.

1. That, at and within the County of Los Angeles, State of California, on or about June 22, 1936, said persons and each in persuance of their pre-conceived plan, and acting in common concert did plan to procure convictions by inducing and using false testimony did threaten and abuse this affiant that if he did not testify that rattlesnakes were used to cause death that they would frame affiant and hang him; that he was subjected to the same kind of insistent questioning for hours and treatment such as was administered to James, and that the same finally broke down his will and despite his original insistence to the contrary, he was compelled by threats and in mortal fear of his life, as well as induced by the false promises of immunity referred to in other parts of this affidavit, to testify to the rattlesnake story on the trial; that the same was substantially false and known to the district attorney and his said men to be false.

2. Affiant further avers that, since his imprisonment he has obtained what purports to be a copy of the reporter's transcript of July 24, 1936, when he was found guilty [fol. 2536] or sentenced that he has remained in ignorance of the legal significance of this statement:

"There Already Has Been a Stipulation That the Court Might Take Into Consideration the Evidence Given in the Trial of Major Raymond Lisenba, Also Known as Robert James, Under Indictment with This Defendant, for the Purpose of Fixing and Determining This Matter."

Affiant avers that this is stark fraud, in that he never at any time ever stipulated or agreed thereto; that at the time of that hearing in court, your affiant did not even know what the word "stipulation" meant, and that he did not understand that by that means the district attorney was having him agree that the testimony of his co-defendant, and all

other testimony given in James trial, would be used against him for the purpose of determining what crime, if any, he had committed; but on the contrary affiant avers that he at that time believed and was led by the statements of the district attorney and his own counsel to believe, that only affiant's own testimony would be considered; that affiant had expected to be given opportunity to introduce further testimony corroborative of his own testimony of innocence and lack of knowledge of crime, but that no adequate opportunity so to do was given. That your affiant was as ignorant of that legal effect of said "stipulation", as he believes that the Supreme Court points out that his co-defendant was of the like trick of the District Attorney in asking James if he had anything to "add" to affiant's state-[fol. 2537] ment; the effect in both cases being to bind them with statements and testimony, without their knowing or intending it. That your affiant never at any time authorized his counsel or any other person to make such stipulation or any stipulation of like nature; that your affiant was likewise ignorant of the legal effect of the further stipulation in the record that day that he was present during the taking of such testimony of James, so used against him without his knowledge; that he was ignorant of the law that he was required to deny the truth of said testimony or be bound thereby. That therein and thereby your affiant's Constitutional right to the assistance of counsel was violated, and he was and is deprived of his liberty without due process of law, which is here set up and assigned as a violation of his rights under Sec. 13, Article I of the California Constitution, and the Fourteenth Amendment to the United States Constitution. That said facts are also detailed as facts of fraud.

3. Affiant wishes the court to see that counsel are in attendance, that a continuance of 30 days or reasonable time be allowed to prepare and file further evidence, and prepare for trial, and that an order for his attendance as a witness be made; affiant further desires that the court make its order prohibiting any member of the district attorney's staff or any officer of California interested in prosecution from contacting, intimidating or molesting affiant or subjecting him to any undue restraint or in any manner to unduly influence his free and voluntary pursuit of this pro-

ceeding; that counsel not associated with either district at- [fols. 2538-2539] torney or previous public defender's office, be appointed; that the present district attorney and staff be disbarred and suspended from prosecuting this action, and that the court appoint the Attorney General to supercede him.

4. Anticipating the usual denial of omission of public duty, affiant also quotes from Shakespeare, Author of Macbeth, a classic drawn from by the Supreme Court as to the hellish brew of the witches in that like fantastic creature of the imagination, here paralleled by the State prosecution, and predicts that their answer in substance will be: as that of the daughter banished fro treason: in "As you Like It"

> "Never as much as in a thought unborn
> did I offend your Highness; (answered)
> Thus do all traitors: if their purgation
> did consist in words,
> They are as innocent as grace itself."

Wherefore, your affiant prays that said judgment be set aside; that he be allowed to withdraw said plea of guilty, and enter his plea of not guilty; that he may have the further and additional incidental relief all as fully indicated as desired in paragraph eleven (11), above; and that he may have such other and further order or judgment as may to the court seem fit and proper.

Charles H. Hope.

Subscribed and sworn to before me this 22nd day of June ~~May~~, 1939. C. H. Clinton R. Duffey, [fol. 2540] Notary Public in and for the County of Marin, State of California. My Commission expires Sept. 3, 1942. (Seal.) Apvd.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 2541] (Endorsed:) Crim. 4068. People v. Lisenba. Filed Oct. 25, 1939. B. Grant Taylor, Clerk, by Coultis, L. A. Deputy. Filed June 26, 1939, L. E. Lampton, County Clerk, by C. K. Boardman, Deputy.

[fol. 2542] In Superior Court of Los Angeles County

No. C-64218

The People of the State of California, Plaintiff,

vs.

Major Raymond Lisenba (also known as Robert James), and Charles H. Hope, Defendants

Affidavit of Charles H. Hope as to Further Specific Instances of Knowing Inducements and Use of False Testimony by District Attorney and His Deputies and Investigators

Filed in Support of Charles Hope's Motion to Withdraw Plea of "Guilty" and to Set Aside Judgments

State of California,
County of Marin, ss:

Charles H. Hope being first duly sworn, deposes and says: I make this affidavit to supplement the affidavit and motion filed by me in C-64218, in the above entitled proceeding of People vs. myself and James or Major Raymond Lisenba.

1. I had no idea that said state prosecuting officials secretly and fraudulently intended to use the same false testimony which they induced me to give as aforesaid against me in my own hearing, as well, which they later did by [fol. 2543] the trick and device of a stipulation the meaning of which I was ignorant.

2. Reading these affidavits in connection with what is said in the dissenting opinion of the Supreme Court in Peo. v. Lisenba, 97 California Decisions, 378, affiant invites attention to at least three specific instances of violation of law by State prosecuting officials referred to, to wit, section 137 and other sections of the penal code, "upon understanding and agreement that the testimony of said witness shall thereby be influenced or who *attempts* by *any other means* fraudulently to induce any person to give false or withhold true testimony is guilty of a felony"; and in this behalf, affiant invites attention to the fact that the forcing of confessions from James and affiant both, and the attempt

thereby to induce both of us to give false testimony is also a felony of and in itself. Affiant avers that his own conduct in giving such testimony was so induced was not wilful, but excusable because given under duress of threats of death by hanging, as well as false promises referred to.

3. The three specific instances, among others, of the knowing inducement and use of false testimony by state officials is as follows:

1. That the snake bit and poisoned the decedent, thereby enabling the state to supply a missing vital and material element of the corpus delicti of the offense charged, when the said district attorney and his deputies and investigators [fol. 2544] knew the same to be false, knew that affiant knew it to be false, and which affiant knew to be untrue;

2. That no promises of leniency or reward had been made to affiant, to induce his testimony,

3. That no threats had induced the false testimony; in instances "2" and "3" entering into the deceit practiced on the Court and jury, and being material evidence going to the credibility of the witness and the weight to be given by the jury to the witnesses testimony.

A number of other specific instances can be stated as to forcing me to testify that the woman moved or let out a sound and showed signs of life, to prove she was alive, at the time they claimed she had been bit by the snake; and inducing me to place the time of my arrival at the house several hours earlier, and to supply other deficiencies in their proof.

Affiant avers that said state prosecuting officials practiced Collusion on the court and jury in attempts to give credence to the State's theories and case, (quoting from dissenting opinion, (399- to 469) "if death was in fact caused by an attempt to perform an abortion, he would not have thrown away an opportunity to avail himself of that defense", and practiced collusion also by the false representations upon the trial to the court and jury that affiant's testimony was free and voluntary and not exacted by promises of immunity but "having been moved solely by the promptings [fol. 2545] of conscience, and not at all induced by promises or understandings", as pointed out to be material by the Supreme Court at p. 403 of said Opinion; and that as a

part of said practice of deceit, deception and collusion, one of said court officials, as a part of such prearrangement and design to improperly influence the jury and to further this deception, could hardly control himself when Judge Fricke went off half-cock and found me guilty of first degree murder, but dashed by me on the stairs, unlocked the jury door and told the jury then deliberating James' case that mine had been set at first degree murder." That this was part of the pre-conceived plan to improperly influence a verdict and was done in order to lend credence, and to dissipate suspicion that the thing was not wholly above-board but induced by promises and as the result of collusion and a collusive understanding and connivance between the state prosecuting officials and affiant. This was also done to buttress and strengthen the state's argument to the jury (p. 403 of the Opinion: "That if the abortion theory was true, Hope would have been a foolish man to have entered a plea of murder in the first degree with a possibility of suffering the extreme penalty"; and the announcement that affiant had been found guilty of murder in the first degree amounted to the giving of evidence to the jury in an unlawful manner, with the covert purpose of unduly and fraudulently influencing their verdict, in connection with said other acts and said conduct forming a part of and [fol. 2546] overt acts under said general scheme and preconceived plan, design and conspiracy to obstruct and pervert the administration of justice and to improperly influence a verdict.

That affiant was induced to give false testimony by said state prosecuting officials which they knew to be false, which he knew to be false, and which they knew that he knew to be false, and that they did so with the corrupt motive and purpose of supplying defects in their evidence and to improperly and thereby unlawfully convict both affiant and his co-defendant of murder in the first degree, as well as to keep from the jury the due consideration of any lesser offense included in the charge or shown by the evidence, under the improper mandatory instruction thereby obtained of the Court that "if it returned a verdict of guilty, it could not be less than murder of the first degree" (p. 403 Opinion). Also to avoid a fatal variance between offense charged and the evidence, requiring a dismissal of the case.

Affiant avers that he was informed by his counsel, Mr.

Cuff, a public defenser co-operating with district attorney in the disposition of criminal cases, that said counsel had been informed by Eugue D. Williams, Deputy District Attorney then in charge of the case, that they (the State) had "nothing "nothing on" affiant, that your affiant believed and relied on said statement which was knowingly falsely made to deceive your affiant, that your affiant was thereby misled and deceived and taken by surprise, and as [fol. 2547] he wrote Judge Fricke later protesting the action (letter of affiant to Judge Fricke, May 19, 1937, replied to by said Judge on June 10th, 1937, Exhibits —, annexed to first affidavit, hereby made a part hereof by express reference in this connection), affiant was "dumbfounded" when the court summarily pronounced him guilty of 1st degree murder; that said Mr. Jack Southard and other deputy district attorneys or investigators, with knowledge of all other state prosecution officials, had falsely represented to -his affiant and led him to believe that he and they would take the stand in behalf of affiant and introduce evidence of innocence in his behalf and use their best efforts to secure his release: that all of said promises were wholly false, made to deceive affiant, did deceive affiant, and were made corruptly to influence and induce said plea and his said testimony as aforesaid; and did induce same; and same are here set forth as facts and circumstances of fraud; that affiant did not know that his plea of guilty could and would be received as a confession of murder in the first degree or murder and he did not intend it as such, but only as a subterfuge or arrangement under his understanding or believed understanding with the state prosecuting officials under which he would later possibly be found guilty of a minor offense such as failing to properly or promptly report as to the facts, or possible complicity in an attempt of some kind to conceal evidence, if affiant was guilty of any crime or misdemeanor, which he does not believe he [fol. 2548] was; that affiant was taken advantage of and thereby by fraud deprived of a trial and right of trial on the merits, in circumvention and violation of his rights under sec. 13 Article I California Constitution and the Fourteenth Amendment to the United States Constitution; that for this reason the proceedings and judgment are void, as the law does not countenance a district attorney thus manufacturing false evidence to imprison.

I aver that said plea of guilty, said testimony on the

trial by me, my statements to the prosecuting officials before and at the trial, and the said judgment were all secured by said state prosecuting officials by the practice of deception and fraud by the said officers on the court and jury and upon me; I aver that the said plea of guilty and said judgment and said false testimony were all procured and induced by said state prosecuting officials by the exercise of intimidation upon me. I further aver that I informed representatives of said district attorney before and after the trial in substance as follows: "That stuff about snakes is the bunk: the snake never bit the woman and you know it." That the said snakes were first introduced into the picture by the investigators of the district attorney's staff, and as affiant earnestly believes had nothing to do with the cause of death.

I do therefore intend to and do hereby revoke and repudiate all of said statements and testimony as having been induced by fraud, duress by threats of hanging and im- [fol. 2549] prisonment, and fear, and as not having been free and voluntary, and as having also been induced by false promises of immunity and release made by said state prosecuting officials to me, which have never been kept, and do further aver that said state prosecuting officials even up to within a short time ago, to wit, November, 1938, at San Quentin, California, repeated to me their promises and said to me, "We will keep our word: You *keep quiet.*"; affiant avers that thereafter said state prosecuting officials wrote a letter to a chaplain at the prison, repudiating their promises and denying same and stating they would oppose any effort affiant makes to upset the case;

As a specific instance of intimidation and duress inducing said false testimony, affiant avers that just before going into the court-room to testify, the state investigators threatened him, saying: "*Now you be damn sure that you swear that the snake struck at the woman and bit her foot*", also, "*Be sure you testify that we have made you no promises, and that the snake struck at the woman's foot,—you are not out of this yourself*", and thereby sought to and did put affiant in fear and thereby attempted to and did induce him falsely to testify that those were the facts; that affiant was thereby put in fear by said threats and intimidation and solely because of fear and said promises, he testified as to the snake incident, falsely, against his will and wish, and over his protest to said district attorney and his staff that

[fol. 2550] it was not true in so far as him being an eye-witness; affiant avers positively that said state prosecuting officials knowingly compelled him to give false testimony to material facts in issue on said trial, and not having before him a copy of the reporter's transcript, and it being impracticable to separate each question and answer to identify the true from the false, affiant takes the course of repudiating the testimony as false and fraudulent, in toto, that is in whole. Affiant avers that for many hours and days at a time he was subjected by said state prosecuting officials to a persistent course of threats and insistence that he give false testimony and testimony as abovementioned which he told them was not true, which affiant knew to be untrue, and which they knew to be untrue and knew that affiant knew it to be untrue, to remedy certain defects in their case and to supply the insufficiency of their evidence to make out the corpus delicti (body of the offense of murder by snakes charged); that thereafter they also fraudulently used this same false testimoay against affiant himself by "stipulation" which affiant had never authorized nor consented to or understood in legal effect. That thereby affiant was compelled to be a witness against himself in violation of his rights under the Constitution.

Wherefore, affiant prays that said judgment be set aside and that he be allowed to withdraw his plea, and that said [fol. 2551] action be dismissed.

Charles H. Hope.

Subscribed and sworn to before me, this 28th day of June, 1939. Clinton R. Duffy, Apvd., Notary Public in and for the County of Marin, State of California. (Seal.) My commission expires Sept. 3, 1942.

[fol. 2552] No. Criminal 64218

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

MAJOR RAYMOND LISENBA (also known as ROBERT JAMES), and CHARLES H. HOPE, Defendants.

Filed Jun 30 1939. L. E. Lampton, County Clerk. By E. V. Schwartz, Deputy

Second affidavit of Charles H. Hope as to further specific instances of knowing inducement and use of false testimony by District Attorneys and his Deputies and Investigators, and Facts of Conspiracy, to obstruct and pervert the administration of Justice on part of said District Attorney, his deputies, et al.

Filed in support of Charles Hope's Motion to Withdraw Plea of "Guilty" and to Set Aside Judgment

To the Clerk of the above-entitled Court:

You are hereby instructed to file the within affidavit in the above-entitled case on behalf of the defendant Charles H. Hope and to bring the fact of the filing of same forthwith to the notice (personally) of the presiding Judge of the Criminal Master Calendar Dept. for appropriate action. Due service by mail made upon Plaintiff. Dated, this 28 day of June, 1939.

Charles H. Hope, Box, 59,885, San Quentin, California, defendant, in propria persona.

[fol. 2553] Copy

EXHIBIT A

California State Prison,
San Quentin, California,
May 19, 1937.

Hon. Charles W. Fricke, Judge in Superior Court, Los Angeles, California.

YOUR HONOR:

If I am in error in addressing your honor, please be kind enough to excuse me and my ignorance of the proper procedure.

I was identified with the James case, tried in your court, sentenced to life imprisonment. I wish to make a few statements, and ask a few questions—of a confidential nature—if it please your honor.

Is it correct that the trial judge has no jurisdiction over cases after one year? If I were to prove to you, beyond doubt, that I did not conspire, and that I was in ignorance of what was going on, would you recall me to review some vital evidence, smothered, when I appeared before you for sentence?

This takes me back a year, when, in a conversation with the late Deputy District Attorney, Mr. Bob Stewart and investigator Jack Southard, I maintained, throughout, I was not guilty of murder, or that I had any knowledge of a murder being planned. So, they put it up to me in this way.

"Did I think I had done something wrong?" I answered [fol. 2554] yes, but I didn't know to what I would be willing to plead guilty. My thought was to lay the facts before the court, and let the court decide; this with the understanding that I should have the opportunity of explaining my side of the case.

A few days later Mr. Southard came to me and said: "Everything is taken care of, and you are to have your day in court, at the end of the trial." I was not very enthusiastic about the arrangement, until later, Mr. Cuff came and reassured me of the same promises. I asked him point blank if a judge could free me, or fix sentence on any charge the evidence might warrant. He told me—"Yes". He did say, however, that I would do some time.

regardless of any evidence, although to this day he does not know what I was prepared to present; namely, I think, because he went into it only far enough to satisfy himself, that I had killed no one,

Well, they talked me into the plea of "guilty" and we came into your Honor's Court. Among other things said, I remember because I was particularly listening for it, was your Honor's remark, that the degree of crime and time of punishment would not be set until after the evidence was presented. This was what was promised me, what I considered fair, naturally assuming this meant all the evidence; proof that would throw an entirely different light on the case, as it affected me, as well as bring some startling facts to light.

[fol. 2555] My day in court arrived, and Mr. Cuff stated that they were ready to present our case. The court replied, "that it would do no good, His mind was already made up—it was first degree murder." I was dum-founded, and arose to object when Mr. Cuff failed to do so, but he merely pushed me back and said; "Keep still!" Later he put me on the stand and asked a few unimportant questions, to which I made answer, thinking all the while • • • "I am found guilty of murder, when I know I am innocent and can prove it." But how? The chance I had been promised in order to get me to plead guilty so I could testify never came.

I cannot bring myself to believe your Honor was aware of this and various other things, I was led to believe you knew, and still not give me the opportunity to tell my side of the story. Neither do I like to believe, it was a deliberate breach of faith on any one's part, rather, the importance of secret information appeared negligible to my advisors.

For example;—an insignificant one if you choose—Can the District Attorney give a complete and coherent solution as to how Mr. James came to be watched after these many months, and finally arrested on incest? I have read some six or seven versions of it. None agree. I can tell you in three words what caused it and why it was done. Does a person guil*yt* of crime go this far to be caught?

I have heard many times, that, though severe, your Honor is fair and just. I believe this to be a fact—there- [fols. 2556-2557] fore this letter. Give me a chance to remove some of the shame and disgrace that has been heaped upon those I love; the stigma I have borne, unjustly. My

burning desire to appear before you and tell my complete story is born after months of meditation and sane deliberation, without malice toward anyone, only that justice may prevail.

It has been over a year since my arrest. My record at Folsom and since I have been transferred here is clear. I do my work to the best of my ability and mind my own business.

May I please expect a reply from you at an early date.

Yours very respectfully, Charles H. Hope. Box #59885, San Quentin, Calif.

[fol. 2558] Copy

EXHIBIT B

THE SUPERIOR COURT, LOS ANGELES, CALIFORNIA

Charles W. Fricke, Judge

June 10th, 1937.

Mr. Charles Hope, box 59885, San Quentin, California.

DEAR SIR:

I received your letter, but your problem is one in which I cannot act to represent you, as I was the Judge in the case, and your personal problems will have to be handled through an attorney.

Yours truly, Charles W. Fricke.

CWF:MTD

Clerk's Certificate to foregoing papers omitted in printing.

[fol. 2559] Crim. 4068

PEOPLE

vs.

LISENBA

Filed October 25, 1939

B. Grant Taylor, Clerk. By Conesis, R. A. Deputy.

[fol. 2560] IN SUPREME COURT OF CALIFORNIA

In Bank

Cr. No. 4068

PEOPLE

vs.

LISENBA

ORDER DENYING PETITION FOR REHEARING—Filed November 3, 1939

By the Court

The petition for a rehearing herein is denied. Curtis, J. and Houser, J. for a rehearing Carter, J. not participating.

Waste, Chief Justice.

Dated: Nov. 3, 1939.

[File endorsement omitted.]

[fols. 2561-2566] IN SUPREME COURT OF CALIFORNIA

Bank

Criminal No. 4068

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, Respondent

vs.

MAJOR RAYMOND LISENBA, Defendant, Appellant

On Appeal from the Superior Court in and for the County of Los Angeles

JUDGMENT—October 5, 1939

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered, It Is Ordered, Adjudged and Decreed by the Court that the Judgment and Order of the Superior Court

in and for the County of Los Angeles in the above entitled cause, be and the same are hereby affirmed.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 5th day of October, 1939, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 6th day of November, A. D. 1939.

B. Grant Taylor, Clerk. By I. M. Johnson, Deputy.
11795. (Seal.)

[fols. 2567-2568] [File endorsement omitted]

[fol. 2569] IN SUPREME COURT OF THE UNITED STATES AND IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

PETITION FOR APPEAL—Filed November 6, 1939

Aggrieved by the final decision of the Supreme Court of the State of California on October 5th, 1939, and by the order of the Supreme Court on November 3, 1939, denying his petition in that Court to rehear the said cause, appellant Major Raymond Lisenba hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order permitting the said appellant for leave to proceed in forma pauperis, and that said order, in lieu of a bond, act as a supersedeas.

[fol. 2570] IN SUPREME COURT OF THE UNITED STATES AND IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 6, 1939

And the said appellant Major Raymond Lisenba assigns the following errors in the record and proceedings in said case:

I

The Supreme Court of the State of California in its opinion, decision, determination and judgment of the case of

the People of the State of California v. this appellant erred in holding that the said Major Raymond Lisenba was not denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, in having live, hissing rattlesnakes brought into the court room during the trial of the said case and the said Supreme Court erred in its opinion, decision, determination and judgment that the said bringing of rattlesnakes into the court room during the trial of the said case, by agents of the State of California, and exhibiting them less than two feet from the jury, did not and does not violate due process of law guaranteed by the Fourteenth Amendment to the Constitu-[fol. 2571] tion of the United States.

II

The Supreme Court of the State of California, in its opinion, decision, determination and judgment of the case of the People of the State of California v. this appellant, erred in holding that the arrest of the appellant on the 19th day of April, 1936, and the forcible taking of him from his home by agents and officers of the State of California without warrant or any process of law, and against petitioner's will and consent, and that the incessant and uninterrupted questioning of petitioner for three days and nights by agents and officers of the State of California during which he was repeatedly accused of numerous acts of a highly criminal nature, including the torture and killing of his wife, Mary Emma James, and the almost incessant questioning of petitioner for a period of nine days immediately thereafter, during which the accusations above mentioned were continually repeated, all of said questioning having relation to said accusations, and immediately preceding and leading to statements made by petitioner in the form of a purported confession of the truth of said accusations, and which said questionings were several times interrupted by said officers brutally beating and otherwise assaulting and seriously injuring petitioner's person,—said questionings and beatings having occurred while petitioner was being held and imprisoned by said officers, without warrant or any process of law, for the first three nights and days without any sleep, [fol. 2572] in a private house, and for the remaining nine days in a public jail and with only brief intervals of sleep between said questionings, all without petitioner's consent,

and the final taking of petitioner to the office of the District Attorney, against petitioner's will and without any lawful or other process and being there further questioned by the District Attorney and his deputies for approximately two hours, without food or sleep and without benefit of petitioner's counsel, and the extorting from petitioner through said acts, questionings and procedure of statements in the form of and purporting to be a confession of guilt, which statements were introduced in evidence during the trial of this case against petitioner's objections, and which statements petitioner made only to terminate the ordeal to which he had been subjected for thirteen days, does not violate due process in this prosecution guaranteed by the Fourteenth Amendment to the Constitution of the United States.

III

The Supreme Court of the State of California erred in its opinion, decision, determination and judgment in the case of the People of the State of California v. this appellant, in holding that this appellant was not denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States when he was placed upon trial in California on the charge of murder of his wife Mary Emma James, in California, and thereafter, during [fol. 2573] the trial of said case, without any indictment, information or judgment, the defendant was tried on evidence from the State of Colorado regarding the death of his former wife, Winona P. James, in Colorado, of which he never was accused and regarding which he never had any court process to secure any witnesses to rebut or refute the testimony so given.

IV

The Supreme Court of the State of California, in its opinion, decision, determination and judgment in the case of the People of the State of California v. this appellant, erred in holding that your petitioner was not denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, when he was deprived of the right of his counsel at any interrogation conducted of him; when he asked to have his counsel present, and without his consent he was removed from the jail, and without his attorney's having been sent for or being present he was removed from the jail and subjected to prolonged and con-

stant questioning, and when statements thus obtained in order to terminate the questioning were permitted to be used in evidence against him.

The Supreme Court of the State of California erred in holding that such proceedings did not violate due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and did not vitiate the verdict.

V

The Supreme Court of the State of California, in its [fol. 2574] opinion, decision, determination and judgment in the case of the People of the State of California v. this appellant, erred in holding that each and all of the above acts did not and do not constitute a denial to appellant of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

For which errors the appellant prays that the said judgment of the Supreme Court of the State of California, dated October 5th, 1939, in the above-entitled cause, be reversed, and a judgment rendered in favor of the said appellant, and for costs.

Major Raymond Lisenba, Appellant, Pro Se.; Morris Lavine, Attorney for Appellant.

[fol. 2575] In Supreme Court of the United States and in the Supreme Court of the State of California

[Title omitted]

Order Allowing Appeal—Filed November 6, 1939

The appellant, Major Raymond Lisenba, having prayed for an allowance of the appeal in this cause to the Supreme Court of the United States from the judgment made and rendered in the above-entitled cause in the Supreme Court of the State of California on the 5th day of October, 1939, and from an order denying his petition for rehearing made on the — day of November, 1939, and from each and every part thereof, and having presented and filed his petition for appeal, assignment of errors and prayer for reversal, pursuant to the statutes and rules in the Supreme Court of the United States in such cases made and provided;

It is Now Ordered that an appeal be and the same is hereby allowed from the Supreme Court of the United States to the Supreme Court of the State of California in the above-entitled cause, as provided by law, and

It is further ordered that the Clerk of the Supreme Court have prepared and certified a transcript of the record, proceedings and judgment and order in this cause, and trans-[fol. 2576] mit the same to the Supreme Court so that he shall have the same in said court within 60 days from this date, and

It is further ordered that the affidavit for leave to proceed in forma pauperis be filed in lieu of bond for costs on appeal.

Dated: November 6th, 1939.

William H. Waste, Chief Justice of the Supreme Court of the State of California.

[fols. 2577-2581] IN THE SUPREME COURT OF THE UNITED STATES AND IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

ORDER STAYING EXECUTION—Filed November 6, 1939

An order having been duly given and made by this Court allowing the appeal of the defendant, Major Raymond Lisenba, from this Court to the Supreme Court of the United States, and an application having been made on behalf of said appellant for a stay of execution, and good cause appearing therefor,

It is Hereby Ordered that the execution of the judgment be stayed until such time as the above pending appeal is finally determined.

Dated: November 6th, 1939.

William H. Waste, Chief Justice of the Supreme Court of the State of California.

[fol. 2582] [File endorsement omitted]

[fol. 2583] IN SUPREME COURT OF THE UNITED STATES AND IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

CERTIFICATE OF CHIEF JUSTICE OF SUPREME COURT OF CALIFORNIA—Filed November 8, 1939

This is to certify that on the 6th day of May, 1936 an indictment was returned against this appellant in the Superior Court of the County of Los Angeles, State of California charging appellant with the crime of murder, a felony; that on the 6th day of May, 1936 appellant was duly arraigned in the Superior Court under said indictment; that on the 11th day of May 1936 he entered a plea of not guilty; that on June 22, 1936 he was placed on trial in Department 43 of said Superior Court and that on the 24th day of July, 1936 the jury returned a verdict finding petitioner guilty of murder in the first degree without recommendation, such verdict carrying with it the death penalty under the laws of the State of California;

That thereafter appellant moved for a new trial, presenting affidavits in support thereof that the presence of snakes in the courtroom had deprived him of a fair trial, among the grounds urged in support of his motion for a new trial; [fol. 2584] that said motion was on the 10th day of September, 1936 denied;

That thereafter and on the 10th day of September, 1936 the court pronounced judgment and sentenced petitioner to suffer the penalty of death;

That petitioner duly and regularly appealed from said judgment to the Supreme Court of the State of California, the court of last resort of this state.

That on the 21st day of March, 1939 the Supreme Court of California, first rendered its decision and judgment, by which judgment the judgment of the Superior Court was affirmed, Justices. Seawell and Curtis, dissenting; the opinions of the majority of the court and the dissenting opinions being fully set forth in 97 California Decisions, 378; 89 Pac. (2) 39.

That thereafter appellant duly moved the said Supreme Court to grant a rehearing of said appeal, and that on

April 20, 1939 said Supreme Court ordered that said appeal be reheard.

That thereafter and on the 5th day of October, 1939, Said Supreme Court of California again rendered its judgment upon said appeal, affirming said judgment; Justice Seawell having died in the meantime, his previous dissenting opinion was adopted by Justices Houser and Curtis, as their dissent.

That appellant, within the time allowed by the laws and [fol. 2585] practice of California, duly and regularly petitioned the Supreme Court of California for a rehearing of its decision of October 5, 1939 on the ground that the trial of the cause and the proceedings had were in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and that the judgment was therefore void and appellant particularly set forth:

1. That the bringing of live, hissing rattlesnakes into a courtroom and exhibiting them to a jury were so inflam-atory and frightening in its nature as to make of the trial a mock and sham and violate the fundamental guarantee of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. That third degree brutal methods were used upon the defendant Lisenba (Robert S. James) to Coerce and extort a purported confession, and that the use in evidence of such alleged confession obtained by such means and methods make void the entire trial under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. That prolonged questioning without sleep and under tortu-ous mental ordeal, similar to that employed in the dark ages, and in the torture chamber, were used upon the defendant, and statements thus extorted and coerced were permitted in evidence in the trial. That the use of the Alleged confession in evidence thus obtained by these [fol. 2586] methods make void the entire trial under the due process clause of the Fourteenth Amendment to the Constitution of the United States;

4. That the principal evidence against the defendant was that of an alleged accomplice named Charles H. Hope. That since the trial the said Charles H. Hope has made affi-

davits and filed the same in the Superior Court of Los Angeles County, stating that his testimony was obtained by deceit, fraud, collusion and coercion and was entirely false; that he was impelled by force and fear, threats and promises and that all these facts, including the falsity of his statements, were known to the prosecution and participated in by them. That testimony thus obtained and a conviction based thereon make a trial a mere pretense and are all in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

5. That alleged evidence of another purported offense in another state was presented in the trial of this case without any indictment, information or judgment thereon and without any jurisdiction of the California court of the subject matter therein, and that said use of said testimony placed the defendant upon trial in California before a California jury on such purported offense, and is in violation of due process of law guaranteed by the Fourteenth Amendment [fol. 2587] to the Constitution of the United States.

6. That Major Raymond Lisenba was unlawfully imprisoned, and isolated in a private building for three nights and days, before being lodged in jail; that he was then held practically incommunicado for eleven days and almost incessantly questioned by officers until the alleged confession was given, and that the use thereof in evidence in the trial was in violation of Due Process of Law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

7. That the repeated taking of Defendant Lisenba from jail without his attorney and against his consent and to the office of district attorney and other places and after prolonged questioning without food and without rest and thereafter extorting a purported confession which was used in the case against appellant was in violation of due process of law guaranteed by the fourteenth amendment to the Constitution of the United States.

That in accordance with the procedure and proceedings of the California Supreme Court the court entertained the petition for rehearing upon each of the grounds above specifically set forth, considered the same, and on November 3, 1939, within the time allowed by law, duly and regularly and explicitly overruled each of the contentions above made

by the appellant Major Raymond Lisenba that his rights under the Fourteenth Amendment to the Constitution of the United States were infringed, Justices Houser and Curtis dissenting, and voting for rehearing, on said [fols. 2588-2610] grounds, Carter, Justice, not participating, and our decision of November 3, 1939 denying the Appellant Major Raymond Lisenba rehearing is to be interpreted and considered as holding against the appellant's contention that his rights under the Fourteenth Amendment to the Constitution of the United States upon each of the grounds above set forth were violated.

That upon November 6, 1939 a petition for appeal to the Supreme Court of the United States from the judgment of this court having been duly and regularly presented, and good cause appearing therefore, the same was allowed.

It is ordered that this certificate be filed in this court and made a part of the record on appeal to the Supreme Court of the United States.

William H. Waste, Chief Justice of the Supreme Court of the State of California. (Seal.)

[fol. 2611] In Supreme Court of California

Crim. No. 4068. In Bank

People of the State of California, Plaintiff and Respondent,

vs.

Major Raymond Lisenba, Defendant and Appellant

* * * * * * *

[fol. 2612] Opinion—March 21, 1939

By the Court:

In an indictment returned by the grand jury of Los Angeles county Major Raymond Lisenba (also known as Robert S. James and who will be referred to as the defendant), and one Charles H. Hope were jointly charged with the murder of Mary Emma James, defendant's wife. The alleged homicide was perpetrated on or about August 5, 1935, and remained undetected for a period of several

months. In fact, the indictment was not returned until May 6, 1936. Thereafter, the accomplice Hope entered a plea of guilty to the charge and at the time of defendant's trial was awaiting sentence. He has been since sentenced to life imprisonment. Hope was the principal witness for the prosecution upon the defendant's trial, at which trial it was the theory of the People that defendant, in league with Hope, had plotted and consummated the death of defendant's wife for the purpose of collecting and dividing the proceeds of certain insurance policies on her life. It was also the theory of the prosecution that the homicide was perpetrated in such manner as to give the appearance of accidental death not only to allay suspicion but in order to bring into operation the double indemnity provisions of the insurance policies. In this connection, the evidence of the prosecution tends to establish that the conspirators undertook to bring about the deceased's death by means of a deliberately inflicted poisonous rattlesnake bite on the under side of deceased's left foot (the assumption probably being that, if fatal, such bite or laceration would appear to have been incurred in or about the garden of her home) and that this ingenious method of destruction having proved ineffective the conspirators accomplished their objective by deliberately drowning the deceased in the bathtub of her home, whereupon her body was placed in the fish pond on the premises to further the "accidental" appearance of her demise. The methods assertedly employed to bring about the deceased's untimely death will hereinafter be more fully described upon a detailed recitation of certain of the evidence. Upon the conclusion of defendant's trial, a verdict was returned finding him guilty of murder in the first degree, without recommendation. This appeal is from the judgment imposing the extreme penalty and from the order denying a new trial. We turn now to a discussion of pertinent evidence in the case.

Viola and James Pemberton, husband and wife, when called by the prosecution testified, in substance, that they had accompanied the defendant to his home on the evening of August 5, 1935, where they were to take dinner with the deceased and defendant; that upon arrival there they failed to find the decedent in the house whereupon defendant procured flashlights and suggested a search of the grounds and garden; that the defendant went to the back and James Pemberton to the front of the premises, that as the witness

James Pemberton walked back through the shrubbery he saw the body of the deceased in and near the fish pond, with the upper part of the body and head (face down) sub-[fol. 2613] merged in the water; and that when the defendant was told of the gruesome discovery he cried and otherwise expressed his grief.

John P. Toohey, a deputy sheriff, testified that he, in company with another deputy and in response to a summons, appeared at the scene at approximately 8:30 p. m., at which time he saw the body of the deceased near the fish pond; that at the time the head was in the water, face up (the discoverers undoubtedly having previously moved it); that the water was approximately 14 inches in depth; and that the body was so placed that he could see that the left leg "was swelled and very blue."

A. L. Hutchinson, also a deputy sheriff, testified that when he arrived at the scene he "noticed a cut on her [deceased's] left toe, her big toe on the left foot"; that the flesh of her left leg "was very dark * * * and it was almost black between the ankle and the knee, very black"; that the "whole [left] leg was black and blue from the ankle up to the knee and on the inside of the leg" and was "some swollen."

Charles H. Hope, the defendant's confessed accomplice and who at the time was awaiting sentence upon his plea of guilty to the charge of murder, testified, as the state's principal witness, that he had known the defendant for approximately seven years; that when conversing with the defendant in the latter's barber shop in June, 1935, the defendant asked him if he had any knowledge of rattlesnakes, to which the witness answered in the negative; that the defendant thereupon stated that he had a friend who had a wife he wanted to kill and desired rattlesnakes for the purpose, adding that if he (Hope) would "get me some rattlesnakes, I will give you $100" and "defray all expenses"; that subsequently he (Hope) bought three rattlesnakes in Long Beach and delivered them a few evenings later to the defendant at his home; that the snakes cost $5 but the defendant paid him $20 prior to their delivery; that the defendant then had him stay at his (defendant's) home for several days and while there had the witness go to town and have two boxes made for the snakes with sliding glass tops; that the boxes were approximately two feet long and nine inches high; that in July, 1935, he again

talked with the defendant at his barber shop at which time the defendant said his friend was dissatisfied with the snakes because they were not fighters and that fighters could be procured at the Ocean Park Snake Pit; that thereafter he went with the defendant to said snake pit where the defendant conversed with the attendant and said "that is the one I want"; that the following day the defendant sent him to purchase the snake so designated; that the purchase was made and the snake was delivered to the defendant; that he next saw the defendant on August 3, 1935, two days prior to the homicide, at which time the defendant said that the snake was no good and that he wanted some fighters; that he (the witness) thereupon went to "Snake Joe" at Pasadena and purchased two snakes which he delivered to the defendant; that the defendant said "his wife [the deceased] had $5000 worth of insurance and he was going to collect it"; that he went to the defendant's home on August 4, 1935, the day preceding the homicide, at which time the defendant stated that the witness was in as deep as the defendant; that defendant had him bring one of the sliding glass top boxes containing a snake from the garage into the house; that he came in the back way to the kitchen at which time he observed the deceased in her nightgown strapped or tied to the kitchen table and with adhesive [fol. 2614] tape, previously purchased by the witness at the defendant's request, fastened over her eyes and mouth; that the defendant told him he got the deceased, who was then pregnant, on the table under a ruse that a doctor was coming to "perform some kind of an operation on her for pregnancy"; that while the deceased remained in this prostrate position the defendant put her left foot into the box containing the snake; that the witness then returned the box to the garage; that he later left in the defendant's car with the box containing the snakes and dead chickens, etc., which had fallen prey to the snakes in defendant's prior tests of their ability to destroy; that he then picked up his (the witness') wife at her place of employment and returned the snakes to "Snake Joe" from whom they had been procured; that he threw the boxes out along the road; that he returned to the defendant's home about 1:30 a. m., August 5, 1935, the day of the homicide; that the defendant then appeared to have been drinking and told the witness that the snakes were no good and that his wife was not even sick; that the defendant thereupon jumped up and

said, "I am going in and drown her"; that the witness stayed in the automobile; that the defendant came out about 4:00 p. m. and said, "That is that"; that at approximately 6:30 or 7:00 a. m., the defendant said the deceased had been dead since 4:00 a. m. and the house "cleaned up"; that defendant then asked him to "help me carry it" whereupon he accompanied the defendant into the house where he observed the deceased lying in the hall dead with her feet toward the bathroom; that the defendant took the upper part of deceased's body and the witness the lower part and carried her "towards the fish pond"; that the witness refused to put deceased in the fish pond as requested by the defendant but went instead to the automobile; that the defendant told him he would care for him "when I get this money"; and that some time later the defendant gave him $100 and instructed him to "get out of town". The witness thereupon identified three persons in the courtroom as the three men from whom on separate occasions he had purchased the snakes as above mentioned. His story was not materially shaken on cross-examination.

Certain portions of Hope's testimony were corroborated by his wife who, among other things, testified that on August 3, 1935, she drove with Hope to a snake farm in Pasadena; that Hope took a box and went to the side of the barn where she saw him with "Snake Joe", whom she identified when he arose in court; that the following morning she drove with Hope to within a block of defendant's home and Hope left her there, the witness driving back to Los Angeles alone; that Hope picked her up at work about 2:00 p. m. of that day (August 4th) in the defendant's car; that there were boxes in the back of the car; that they again drove out to the snake farm in Pasadena; that Hope took a box and went inside, returning several minutes later with "Snake Joe"; that on the return trip Hope threw out two boxes with glass tops; that Hope left her after dinner and she did not see him again until the following morning (the morning of the homicide) when he appeared "white and jittery and had been drinking".

Additional corroboration of portions of Hope's story appears in the testimony of the three persons from whom he assertedly purchased the several snakes. Roland H. Kirby testified that early in July, 1935, Hope came to him and said he was interested in experimental work and inquired

if he had snakes "with fangs and poison"; that Hope pur-[fol. 2615] chased three snakes and the witness gave him a jar of crystallized rattlesnake venom.

Mike Allman, who operated a reptile show at Long Beach, testified that the defendant and Hope one day came to his snake pit; that they had been drinking and were noisy; that the defendant offered to bet that the witness had no poisonous snakes; that the following day Hope returned with a sliding glass top box and purchased a rattlesnake, stating that he had lost $100 to the defendant in a poker game and the defendant had offered to bet him $50 that the witness had no poisonous snakes; and that upon being assured that a certain snake was poisonous, Hope purchased it to recoup a part of his card loss to the defendant. On redirect examination the witness stated that some time later and after their arrest, he had identified and picked out the defendant and Hope from a crowd of persons.

Joe Houtenbrink, known as "Snake Joe", testified that he operated a snake farm in Pasadena; that Hope came there on August 3, 1935 (two days prior to the homicide) and purchased two Diamond Back or Crotalus Atrox rattlesnakes for which he paid $3.00; that Hope said he had a friend and "he said he already bought some snakes from other places and they wasn't hot and he wanted a real hot one and he was told to come over to me to get the snakes, that I handled hot snakes"; that Hope explained he wanted the snakes to bite and kill a dog and thus win a bet; that Hope had a box with a glass cover or top for the snakes; that he saw Hope the following day about 3:00 p. m. (the day preceding the homicide) and that at that time he repurchased the snakes from him for half price. This testimony corroborates that of Hope and his wife.

[1] At this point in the trial argument arose between counsel over the prosecution's proposal to bring into court the two snakes purchased by Hope from the preceding witness and which the district attorney declared were "the actual snakes that were at the house that day". Defense counsel vigorously opposed their production in court but the objection was overruled. The two snakes were thereupon produced in court confined in boxes. Defense counsel then insisted that the record show that the courtroom was assertedly thrown into a state of excitement and consternation by the production of the two snakes. However, in

opposition to counsel's assertion, the record also discloses the statement of the trial judge that the decorum of the courtroom and the orderly conduct of the trial were not disturbed in any manner by the incident. Thereupon, "Snake Joe", still on the stand, identified the two snakes so produced as the two he had sold to Hope two days prior to deceased's death and had repurchased from him one day prior thereto. According to Hope's testimony, at least one of the two snakes so identified, was employed by defendant and him to inflict a poisonous bite on the deceased's left foot when it was pushed by the defendant into the box containing the reptile. In view of such identification of the snakes and their employment in the plan to bring about the death of deceased, we perceive no error in the trial court's ruling permitting the production of the snakes for the inspection of the jury. It is not uncommon upon a murder trial to offer in evidence as part of the res gestae the medium employed to bring about the violent or untimely death of the victim. In People v. Bannon, 59 Cal. App. 50, 56, it is stated that "As a general rule physical objects which constitute a part of the transaction, or which serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under [fol. 2616] judicial investigation." (See, also, People v. Peete, 54 Cal. App. 333, 348, and 8 Cal. Jur. 143, sec. 228.) Moreover, the production of the identical snakes tended to corroborate the testimony of prosecution witnesses and to otherwise support the case of the People. It might also be mentioned that if the production of the snakes in court caused the extreme state of excitation urged by the defense, it is difficult to appreciate why defense counsel at a later time in the trial and during the development of the case by the defense, again produced the snakes and thus risked a repetition of the situation of which complaint is here made.

Returning to our discussion of the evidence, we find that the witness Irving Sherman, called by the people, testified to the effect that his father was in the cabinet business and that Hope on July 28, 1935 (several days prior to the homicide) ordered and had made two boxes with sliding glass tops. This item of evidence lends some credence to portions of Hope's testimony as well as to that of other prosecution witnesses.

In support of Hope's testimony that he was with the defendant at his shop and at his home several times prior to the homicide, thus affording opportunity for the planning and carrying out of their scheme, there is the testimony of Lois Wright, the defendant's niece, that she had seen Hope at defendant's barber shop, where she worked, and also had seen him in July, 1935, at defendant's home.

Sam Grant, a barber in defendant's shop, also placed Hope there on many occasions in 1935.

Dr. A. F. Wagner, the autopsy surgeon, testified that he found a laceration on the surface of deceased's great left toe; that her left foot was considerably swollen and discolored, the swelling extending up to the hip; and that deceased's lungs contained a considerable amount of water. He gave as the cause of death, "drowning and an acute cellulitis [swelling] of the legs." Cellulitis, he testified, is "always due to an infection of some kind"; that cellulitis resulting from a bacterial infection would take from two or three days to a week to reach the extent it had in the deceased but that if caused by "animal poisons" it would progress "much faster". He elaborated to the extent of saying that animal poisons capable of producing cellulitis such as the deceased had would be "the venoms of insects and snakes, spiders, and so forth". He further testified that the cellulitis present in deceased was not of the bacteriological type but was of the "animal poison" type and "could have been" caused by the bite of a snake. In addition, he testified that he again had examined the deceased's body in May, 1936, following its disinterment when criminal proceedings appeared in order, and that he was of the opinion that the laceration on the deceased's toe was caused by a rattlesnake bite.

Dr. Gustave Boehme, who was present at the examination following deceased's disinterment, testified that he had made a special study of snakes and snakebites; that on deceased's great toe of the left foot he had discovered an "old laceration wound approximately a quarter of an inch in length" which could have been caused by a number of things, but, in his opinion, had been caused "by some venomous creature, probably a snake, and all the other findings on the leg were compatible with such a finding", adding that the single incision was such "as could be caused by a fang striking at an angle, perhaps". In his brief the

defendant concedes that this testimony is corroborative of Hope's story.

Mrs. Ethel Smith, another niece of the defendant, testified, among other things, that the defendant had sent a trunk to her home for storage and that certain rope shown [fol. 2617] to her was in the trunk. Charles Griffen, an investigator for the district attorney, testified that he found the rope in the trunk. The significance of the testimony of these two witnesses lies in the fact that Hope when on the stand had previously identified the rope as being similar to that with which the deceased had been tied to the table when her foot was placed in the box containing the snake.

In support of its claim that the motive underlying the deceased's untimely death was the collection of insurance moneys, the prosecution produced as a witness one Louis Berry, an insurance agent with the Mutual Life Insurance Company, who testified that he had been a customer at defendant's barber shop and had solicited him for life insurance; that defendant said he was not personally interested but knew a girl who might be interested in life insurance; that about two weeks later defendant inquired as to the cost of a $5000, twenty or twenty-five year endowment policy on a girl 26 years of age, whose name he would not reveal; that defendant agreed to submit the matter to the prospect; that about one week later the defendant introduced the witness to the prospective client, Mary E. Busch, who later became the defendant's wife and for whose murder he now stands convicted; that on June 25, 1935, he delivered to her a $5000 policy which named the defendant as beneficiary, that subsequently and on July 30th, he called on the defendant in response to the latter's telephone request and the defendant inquired as to the effect on the policy of a misrepresentation by the insured at the time of applying therefor that she was married, when, in fact, she was not (deceased and defendant had been living together at the time); that the defendant stated they were not married until July 19th, following the issuance of the policy; that he (the witness) checked the matter with the company and reported back to the defendant that the policy was not affected thereby; that one premium was paid on the policy; and that after the deceased's death the defendant inquired if the company would pay under the double indemnity provisions of the policy as a result of the accidental charac-

ter of her death. On cross-examination the witness testified that the defendant had procured other prospective clients for him.

Max Galatz, a representative of the Occidental Life Insurance Company, testified that late in May, 1935, he received two applications for insurance on the life of the deceased, one for a $5000 policy and the other for a $700 policy; that defendant was named beneficiary in both; that the defendant and deceased (contrary to the fact) said they were husband and wife at the time; that he told the defendant that he would have to have more insurance on his life than the deceased had on hers; that defendant said he had ample insurance in two or three companies but applied for a $3000 policy on himself; that the policies were issued and delivered about June 12th; and that only one premium was paid by the defendant on each of said policies, including his own. On cross-examination, the witness stated that in litigation which followed on the policies after deceased's death the defendant claimed under the double indemnity provisions but later settled for $3500, which amount (less than the face value of the policies) was paid to the defendant. Defendant's testimony given during the trial of such action was read into this record by the phonographic reporter, from which it appeared that the defendant met the deceased about March 1, 1935; that they began living to-[fol. 2618] gether early in May, 1935; that defendant, unknown to the deceased, had arranged for a mock marriage inasmuch as he could not then legally marry deceased because of the pendency of an annulment proceeding growing out of a previous marriage; that they thereafter became legally married on July 19, 1935; and that the deceased was in "marvellous health" up to the time of her death. In connection with the two policies last above mentioned, the defendant two or three weeks prior to deceased's death likewise made inquiry as to the effect of the misrepresentation that the parties were married at the time of making application therefor.

E. L. Taggart, an automobile salesman, testified that he met the defendant early in 1935 and that defendant then stated that he desired to buy a cheap car with the understanding that he could turn it in on a large Studebaker in a few months upon his receipt of $10,000 from an "estate".

[2] Madge Reed testified, in substance, that she met the defendant in the Italian Village on July 10, 1935; that he stated he was visiting from Kansas and was staying with his sister; that the defendant became intoxicated and asked her to drive him home, which she did; that while she was at his home, a woman who identified herself as his wife (the deceased) came home unexpectedly from a convention; that the defendant telephoned her several times thereafter, including a call two days prior to the deceased's demise; that defendant visited her at her apartment on August 11th (six days after deceased had died) and stated that they were trying to frame him for his wife's death but that he would collect her insurance money, marry the witness and they would go north; that defendant stated in the event of his indictment he wanted to use the witness as a surprise witness and would give her $2000 if she would testify that she had met the defendant and deceased five weeks previously; that on the morning of deceased's death the witness had seen the deceased on her porch and that deceased had then complained of not feeling well, making particular mention of a sore leg; that she (the witness) and defendant registered that night at a hotel and talked over his troubles and the asserted attempt to frame him; that defendant had her make notes on a card as to how he wanted her to testify (briefly outlined above), whereupon the witness identified the card on which she had written the notes and also the hotel register. She further testified that defendant gave her $60 at that time and promised her $2000 later.

We find no error in the rulings admitting and thereafter refusing to strike out the testimony of this witness. It tended in some degree to establish the motive advanced by the prosecution—collection of insurance money coupled with the purpose of marrying another woman. It also tends to disclose an effort on the defendant's part to establish an alibi in the event his foul deed came to light.

[3] At approximately this point in the trial the prosecution was about to offer in evidence a statement or confession made by the defendant in the early morning hours of May 3, 1936, in the office of the district attorney and in the presence of several persons. Preliminary to such offer, however, and upon objection thereto by the defendant, the people undertook to establish that the statement or confession was the free and voluntary act of the defendant,

uninfluenced by promises, threats or persuasions. Defendant, on the other hand, undertook to establish that the state-[fol. 2619] ment or confession was improperly extracted from him. As a result, much of the evidence on this phase of the case is highly conflicting, the defendant in many instances contradicting the people's showing. The conflict so created was resolved against the defendant by the trial court in the first instance upon its ruling admitting the statement or confession as the free and voluntary act of the defendant and by the jury in the second instance by its verdict finding him guilty as charged. However, in view of the vigorous presentation and argument of this point upon the present appeal, we feel justified in developing the matter at some length in order that the general state of the record in this respect may be known.

The defendant took the stand on voir dire in an effort to show the asserted involuntary character of the confession and testified that he had been constantly questioned, threatened and beaten by the officers from the time of his arrest on April 19th, without a warrant, until he was "booked" at the county jail on the 21st. He asserted that his ears were bruised and swollen and that he had suffered a hernia as a result of such manhandling. During this period he was assertedly proffered manslaughter punishment in exchange for a confession. His counsel testified that when he later saw the defendant in the county jail his ears were blue and swollen. Several depositions were offered by the defendant as tending to show that he was congenitally weak-minded and therefore more likely to capitulate to coercive methods than the average person.

It appears from the testimony adduced by the people that the defendant was placed under observation in April, 1936, for suspected incest involving his niece, at which time the authorities uncovered and developed the criminal character of deceased's death which had occurred several months prior thereto. As a result of these developments the defendant was arrested on April 19, 1936. He was not taken without delay before a magistrate nor was he immediately incarcerated in the county jail as required by sections 849 and 1597 of the Penal Code. Instead, and after some preliminary questioning in the office of the district attorney, he was taken by the officers to a private home, adjoining that where the defendant had been living with his niece,

and where admittedly he was held incommunicado for a period of about forty-eight hours, during all of which time he was admittedly subjected to incessant questioning by the officers who worked in shifts. The defendant was apparently deprived of rest and sleep during practically all of such period. At least, the prosecution failed to offer any positive testimony that defendant during this period was afforded an opportunity of going to bed, a privilege concededly enjoyed by the examining officers. In addition, one of the officers testified that during the questioning he became angered and "slapped" the defendant's face when the defendant was said to have referred to the deceased as a "whore." Other than subjecting defendant to constant questioning, and the "slap" administered to him, the several officers categorically denied that any threats or promises were made to or any physical beatings were inflicted upon the defendant during the two day period he was being held and questioned in the private house. Charles Griffen, the assistant chief of the bureau of investigation in the office of the district attorney, while admitting the continuous course of questioning of the defendant during this period, testified that other than the slap mentioned, no force or violence was employed on the defendant; that the defendant was calm and collected; and that he appeared unafraid and answered questions (other than admitting the crime) readily and rationally.

[fol. 2620]

Everett Davis, another investigator for the district attorney, denied that the defendant was offered a lighter punishment if he would confess and testified that the defendant was told no one could offer or promise him anything but if he wanted to tell the story they would listen. He added that of his own knowledge, the defendant slept from 3:30 to 8:00 a. m., April 21st, in a chair with his feet on a second chair. Two other officers likewise denied defendant's statement of threats and violence during the period April 19th to 21st, one of whom testified that defendant explained receiving the hernia in an automobile accident. Three deputy sheriffs, who saw the defendant (stripped and otherwise) in the county jail on and subsequent to April 21st testified, in substance, that they saw no bruises, marks or discolorations on defendant's body or head and that he made no complaints as to his treatment or condition.

It is apparent, therefore, that the evidence is sharply

conflicting on this phase of the case, other than that showing continued questioning of the defendant throughout the period of April 19th to 21st, during which an ill-advised slap was administered to him, and for all present purposes the conflicts therein must be presumed to have been resolved against the defendant by both the trial court and the jury.

Regardless of the impropriety of holding and continuously examining the defendant for many hours in a place other than a county jail prior to the filing of any charge against him, a course which we expressly disapprove, it is of the utmost significance that a confession was neither obtained nor extracted from the defendant during such period. The record definitely discloses that this treatment of which defendant here complains failed of its asserted objective. In other words, no matter how improper the treatment of defendant between April 19th and 21st, a confession did not result therefrom. It was not until May 3, 1936, twelve days later, that the confession sought to be introduced was obtained. In this respect, the evidence shows that the defendant was removed from the private house where he had been held and booked at the county jail on April 21st. One of his counsel took the stand and testified that he saw the defendant in the county jail on April 25th, at which time he instructed the defendant not to answer any questions in his absence. On cross-examination, said counsel admitted that he saw the defendant "when he was arraigned" on April 21, 1936. It is apparent, therefore, that the defendant was not held incommunicado when the confession was forthcoming. He had enjoyed the benefit and association of counsel and had been before the grand jury and the court. It is also of the utmost importance that the defendant did not confess until after Hope, his accomplice, had been arrested on May 1st and had told the story to the officers in charge of the investigation. The defendant's confession followed within two days thereafter. Defendant testified further on voir dire, however, that he still suffered from the pain and memory of the prior beatings assertedly administered to him; that he was afraid to follow the advice of his counsel and continue to refuse to answer questions or to deny the statements of the officers as to the [fol. 2621] manner of the commission of the homicide; that the officers accused him of lying and threatened to take him

back to the house and "beat your God damned head off"; that he could not take another beating and therefore offered to "gladly admit it [Hope's story] and save myself other punishment". On cross-examination, he admitted that he did not confess following the alleged beatings administered to him by the officers during his confinement in the private house from April 19th to 21st and he also admitted that no threats, promises or beatings preceded his statement and confession in the district attorney's office on May 2nd and 3rd.

Chronologically, the circumstances leading up to the confession were narrated by certain of the officers, as follows: Williard L. Killion, a deputy sheriff, testified that on the morning of May 2nd, he took the defendant from his cell in the county jail to the Chaplain's room; that many persons were there; that no one made any promises or exerted any coercive influence to induce the defendant to talk; that an unsuccessful effort was made to locate defendant's counsel, as requested by him; that all statements thereafter made by the defendant were free and voluntary and without objection on his part that his counsel was not there; and that Hope was brought into the room.

Edward F. Lynch, who reported the proceedings at this meeting, testified that deputy district attorney Williams related Hope's story to the defendant and asked the defendant if he had anything to add thereto and the defendant replied "Nothing". This session ended at 11:50 a. m. on May 2, 1936, whereupon the defendant was returned to his cell. Later in the day and pursuant to court order, he was taken to the scene of the homicide by a deputy sheriff. Still later, he was returned to the office of the district attorney where he answered questions in the presence of several persons. Robert P. Stewart, the chief deputy district attorney, testified that the district attorney principally examined the defendant during the afternoon of May 2d; that Hope was brought in during the session; that no promises or other improper influences were exerted over the defendant; and that defendant was rational and coherent at all times. Along about midnight the defendant was taken out to a restaurant by Killion, the deputy sheriff, and two others. While in the restaurant, the defendant, according to Killion's testimony, voluntarily unburdened himself as to the commission of the crime. In this narrative the de-

fendant told of plotting with Hope to kill the deceased and to collect and share her insurance money. However, throughout his statement of the circumstances surrounding the commission of the crime, the defendant charged that Hope was the principal actor in the consummation of the crime. It was Hope, he said, who placed the deceased's foot in the box for the snake to bite and who later drowned deceased in the bathtub and placed her body in the fish pond. The defendant during this statement also admitted that he had had the deceased write a letter to her sister complaining of a sore foot and leg, which letter was found, unmailed, in the deceased's home on the evening of her death by the Pembertons and the defendant immediately after they had discovered her lifeless body. This letter was offered in evidence by the prosecution and there is evidence, conceded in the defendant's brief, that it was not in the deceased's normal handwriting. The inference was available to the jury that the defendant had compelled its writing, a fact later admitted by him in his confession, to furnish, if [fol. 2622] possible, an alibi.

At the conclusion of this restaurant statement, the defendant was returned to the office of the district attorney where, between the hours of 1:30 and 3:30 a.m. May 3, 1936, according to the testimony of several there present, the defendant freely and voluntarily detailed the circumstances of the crime in a confession which the prosecution thereupon offered and had admitted in evidence.

It cannot be said, under all of the evidence, that the court below erred in admitting the defendant's reply to the accusatory statement and his confession as free and voluntary acts on his part. It is declared in People v. Lehew, 209 Cal. 336, 341, that "Whether a confession is free and voluntary is a preliminary question addressed to the trial court, and a considerable measure of discretion must be allowed that court in determining it. * * * In People v. Siemsen, supra, 194 Cal. 595, it is declared that the 'admissibility of such evidence so largely depends upon the special circumstances connected with the confession, that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed, in the first instance, to the [trial] judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forborne to mark with absolute precision the limits of admission and exclusion.' The

mere fact that the confession was made to a police or other officer of the law while the accused was under arrest, does not necessarily render the confession involuntary and inadmissible. So, also, the mere fact that a confession is made in answer to questions will not authorize its rejection, though the fact of its having been so obtained may be an important element in determining whether the answers were voluntary. * * * A reviewing court cannot say that the trial court committed error in admitting a confession of guilt unless such error appears as a matter of law from the record presented. The trial court is clothed with considerable discretion in determining whether or not the confession was free and voluntary, and where the evidence is conflicting on the subject, it must be assumed that the testimony concerning a defendant's admission was properly admitted."

In the present case the testimony is overwhelming to the effect that during May 2nd and May 3rd, when the statement and confession were made, no promises, immunities, threats or forms of violence were employed to overcome the free will of the defendant. This is corroborated by defendant's own testimony. That he was questioned for many hours is not, of itself, improper, particularly when, as testified, he freely responded thereto. Some recognition must be given to the practical problems presented in the work of crime detection. A reasonable conclusion, and one which the trial court and jury might have readily reached on all the evidence, is that the defendant broke down and confessed his participation in the crime only after his confederate and accomplice had been arrested and detailed the murder conspiracy and had been brought face to face with the defendant who had been informed of the details of his confederate's story. Each case must turn on its own facts and we therefore give but passing mention to the authorities relied on by the defendant.

[4] Turning our attention now to the substance of the confession, and eliminating many unnecessary details, we find defendant relating that early in July, while the deceased was away for a few days at a convention, he and Hope planned to kill her and to share equally in the proceeds of [fol. 2623] her insurance policies; that Hope first suggested a false hold-up in which deceased would be shot, but they later agreed on Hope's second suggestion of permitting a rattlesnake to bite her in the hope that the infection would

prove fatal; that he gave Hope $20 and the latter had "certain kinds of boxes made" and brought snakes up to defendant's home in them; that Hope brought three the first time and two the second, all of which proved unsatisfactory upon experimentation with chickens, rabbits, etc.; that two days before the deceased's death he gave Hope $6 to purchase two "hot" snakes Hope had reported seeing; that these snakes were procured and kept in boxes in his garage over Saturday night (Aug. 3, 1935); that the conspirators did some drinking with deceased that night and discussed an abortion which it was claimed she desired and believed that Hope, as an asserted medical student, was to perform the following day; that Hope left and returned the next morning about 11:00; that he gave Hope all the money he had, about $100, and left about 1:00 p.m. because deceased "had been too good to me and I just couldn't have anything to do with that part of it."; that Hope said deceased would die in about one hour; that he (defendant) returned about 4:00 p.m. and found Hope intoxicated and that Hope had deceased "full of liquor"; that Hope told him he had put her foot in the box containing a snake; that Hope left and returned at 6:00 a.m., Monday, August 5, 1935; that he suggested calling it off but Hope said they had gone too far to stop; that at Hope's suggestion he left for his barber shop with the understanding that Hope would "care" for the deceased, who was still alive, by burning the "house up"; that Hope came to the shop about 1:00 p.m. and reported that he had not burned the house but had thrown deceased "in the bath tub and drowned her" and then placed her body in the fish pond; that he upbraided Hope for "the worst thing you could have done" because he [defendant] "had a wife drown in a bath tub in Colorado Springs a little while ago"; that he told Hope "there ain't enough men in the District Attorney's office to make me talk", adding "and there wasn't if he [Hope] had not told it"; that he then arranged to have the Pembertons, who were innocent of the situation and whose testimony is related above, go home with him; that when he left for his shop on Monday morning he did so with the idea that deceased "was to be murdered by Hope" and they were to share equally in the proceeds of her insurance; that the snakes were purchased for that purpose and deceased, as a ruse, was informed a desired abortion was to be performed; that after deceased's burial and while intoxicated, he may

have offered the Reed woman a $1,000 to say she saw deceased alive in her yard on the day of her death; that the letter above referred to was written by deceased while intoxicated and under his direction; and that his statements were "the true stuff" and made freely and voluntarily. During this session, Hope was brought in to the room and confronted the defendant.

With the foregoing evidence before it the jury had ample support for its verdict. In his confession the defendant admitted his participation in the death of deceased, though he again undertook to point to his accomplice as the principal actor. Under settled principles, this would not, however, serve to relieve him from full responsibility for the homicide which he and his accomplice planned and perpe- [fol. 2624] trated.

[5] In addition to the evidence above narrated, and as tending to prove that the death of deceased was not the result of accident, as it at first appeared, but was deliberately planned and executed in order to collect insurance money payable on the death of the victim, the prosecution offered evidence tending to show that a former wife of the defendant, equally heavily insured in favor of the defendant, while recovering from serious injuries incurred in an automobile accident in 1932, which the defendant survived with but little inconvenience, was likewise found drowned in the bathtub of their home with resulting monetary benefit to the defendant. In making the offer of proof in the absence of the jury, the district attorney stated that he would adduce evidence tending to show that the defendant struck his former wife on the head with a blunt instrument and then ran the automobile in which they were riding off the Pike's Peak Highway and the victim not having died from the injuries so incurred was later and while recuperating, drowned in the bathtub. This evidence, hereinafter briefly narrated, in our opinion, was sufficient, prima facie, to indicate that defendant had been a party to the death of a former wife under somewhat similar circumstances and it was apparently offered and admitted as tending to show common plan or scheme in the execution of two homicides and an absence of accident in the deceased's untimely demise. Defendant unsuccessfully objected to the admission of this evidence on the ground that it would fail to establish any of the elements of the offense for which he was on trial and would serve only to prejudice him before the jury.

In support of its offer of proof the prosecution produced several witnesses. The first, J. D. Rogers, superintendent of the Pike's Peak Highway, testified that he first saw the defendant about 7:00 p.m., September 21, 1932, at Glenn Cove, Colorado, where the defendant reported that he had been in an automobile accident; that defendant's clothes were "neat" and not soiled or disarranged; that he drove the defendant back to the scene of the accident, the defendant stating that he "really don't know how it happened" as his (former) wife had been driving coming down the mountain while he was looking across the valley with field glasses; that defendant said the car suddenly left the road and that he (defendant) jumped from the car after it had travelled about fifty feet down the mountainside; that the car came to rest against a large boulder one hundred and fifty feet below the road; that he (the witness) found the deceased lying on the right hand side of the car (though she was supposed to be driving on the left side) with her head down hill and her feet on the running board of the car; that her clothes were free of dirt; that the car rested on its wheels; that there was considerable blood inside the car, especially on the back of the cushion on the right side and on the floor boards; that a hammer on the floor of the car was covered with blood; that he smelled liquor from the deceased and felt a softness behind her ear when he lifted her; that there were foot prints back about eighty feet where the car left the road and on either side of the tire marks, some pointing to where the car went off the road; that the defendant's car was the last one to come down the mountain that particular evening, all others having checked out ahead; and that the defendant appeared quite calm.

Miss Grace Yarnell, a cousin of this former wife of the [fol. 2625] defendant, testified that she had visited the injured woman while she was recuperating in the hospital, which covered the period from September 21 to October 8, 1932; that she saw the injuries over her cousin's right eye and back of her ear; that after October 8th she saw the injured person in a cottage in Manitou Springs, Colorado, where defendant had moved her prior to complete recovery; and that defendant had told her he was thrown free of the car and had lifted his (former) wife from the car and placed her on the ground with blankets about her.

Gerald Rogers testified that he worked in the local grocery store in Manitou Springs; that defendant came to the store

about 5 p.m. on October 14, 1932, ordered some groceries and asked that they be delivered; that defendant then said that he would ride home with the witness; that he (the witness) went into the kitchen and the defendant went into the bedroom and then to the bathroom; that defendant then called him and he saw defendant's wife lying on her back in a half-filled tub of lukewarm water. On cross-examination, it appeared that the defendant had ridden home with him on prior occasions.

Dr. George B. Gilmore testified that he was coroner in 1932; that he saw defendant's (former) wife on October 14, 1932; that she was then on a bed and dead; that defendant said he had been away from home for several hours at the time of her death; that the defendant related that the doctors in the hospital had theretofore warned deceased against washing her hair because of her head injuries but that she apparently had undertaken it in his absence and drowned as a result; and that he (the witness) suggested an autopsy but defendant opposed it, saying he "couldn't permit anything of that sort." The doctor then identified certain letters subsequently addressed to him by the defendant requesting a change in the death certificate in order to show that the drowning was attributable to the injuries received in the earlier automobile accident (apparently to facilitate collection under the accidental and double indemnity provisions of the insurance policies.)

Mrs. Irene F. Snyder, bookkeeper at the hospital, testified that defendant's former wife was there confined from September 21 to October 8, 1932, and that the defendant had stated at the time that he was without funds to pay the bill but intended negotiating a loan on an insurance policy. There is other evidence that defendant was financially embarrassed and had borrowed money about this time.

The prosecution produced Doctor Decker, concededly qualified to express medical opinions, and who examined and interpreted certain x-ray photographs theretofore taken in the Colorado hospital, who testified that, in his opinion, the defendant's former wife suffered fractures of the skull from two blows, one on the side and the other on the front of the head; that the fractures had been caused by a hard, moving object being projected against the head and not by the head being projected against a hard, stationary object; and that the blow on the side of the head had

been received first. That this evidence tends to support the prosecution's theory of a felonious assault on defendant's former wife must be admitted and defendant concedes in his brief that it was for the jury to weigh this evidence as against his conflicting medical testimony touching the same subject.

John A. McKelvey testified that when defendant pur- [fol. 2626] chased a car from him in 1932, he stated that his previous car had been wrecked when the steering knuckle broke and the car went off the Pike's Peak road as he was driving.

C. A. Pries, who was with the Prudential Life Insurance Company in 1932, testified that the defendant at that time told him he had an insurance prospect for him; that he later met Miss Winona Wallace (who subsequently became defendant's wife and, as shown, was found drowned in the bathtub of their Colorado home) at defendant's apartment; that defendant said he wanted a $5,000 policy on himself and a similar policy on the lady; that the defendant asked if he could be named beneficiary in the latter policy and was informed that this was not possible until the parties were married; that the two policies were later delivered, the defendant being named beneficiary in the lady's policy; that upon the death of the lady (who as stated, had prior to death married defendant) the defendant asked for double indemnity payment under the policy; and that the defendant only carried his own policy for three months. The witness thereupon identified a check sent later to the defendant in payment of his claim under the policy.

Bayard Judd, who was with the Kansas City Life Insurance Company, testified that just prior to the death of Winona Wallace James (defendant's former wife), she and defendant had sought an immediate loan on that company's policy covering her life.

We find no error in the trial court's admission of this evidence touching the Colorado incident involving the death of a prior wife of the defendant under circumstances similar in many respects to the circumstances surrounding the death of the deceased for which he was on trial. In each instance the defendant had placed his asserted victim in touch with insurance agents with a view to and ultimate procurement of life insurance on her. In each instance defendant inquired whether he might be named beneficiary when the parties were not married. In each instance he

received a negative reply and thereafter married the asserted victim. In each instance a policy or policies were issued naming him as beneficiary. In each instance the insured was shortly thereafter found drowned in or near the home she occupied with the defendant under circumstances having an appearance of accident but upon full and close inspection tending strongly to indicate foul play. In each instance the defendant claimed under the accidental, double indemnity provisions of the policy or policies and, in each instance, ultimately profited financially by the collection of his wife's insurance.

In view of these many similar and unusual circumstances, we are of the view that the evidence of the Colorado incident was admissible not to prejudice the defendant by proof of the prior commission of another crime but as tending to establish that the death of the deceased in the present action was not accidental, as it might at first appear, and as claimed by the defendant, but was the result of a general plan or scheme on the defendant's part to insure, marry and murder his victims in order that he might thereby profit financially. In its instructions to the jury, several of which were requested by the defendant, the court below properly limited the purpose for which it might consider this evidence. That evidence of prior similar acts and crimes is admissible for the purposes already mentioned, is now well established. (People v. Stutsman, 66 Cal. App. 134; People v. Barnes, 111 Cal. App. 605; People v. Morani, 196 Cal. 154, 160; Holt v. U. S., 42 Fed. Rep. [2d] 103, 106-107; People [fol. 2627] v. Gosden, 6 Cal. [2d] 14, 24. See, also, the English "bathtub" murder case, R. v. George Joseph Smith, 21 Crim. App. Rep. 229, 236.)

The Morani case, supra, contains the following: " 'In the case of People v. Seaman, 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203, it is said: "Upon principle and authority it is clear that where a felonious intent is an essential ingredient of the crime charged, and the act done is claimed to have been innocently or accidentally done, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result as tending to show guilty knowledge, and the intent or purpose with which the particular act was done and to rebut the presumption that might otherwise obtain." ' "

It is stated in the Holt case, supra, that "No good purpose would be served by a review of the myriad of cases where evidence of other and collateral transactions has been admitted to prove the quo animo, scienter, motive, or intent of the defendant in the doing of a particular act; nor in restating the circumstances under which such evidence may strongly tend to support the charge made. Many of the authorities would be inapplicable to the present case, for there the evidence was introduced to show knowledge, while here its purpose is to negative the claim of accident and the alleged innocent motive, injected into the case by the defendant himself. It is sufficient to say that from the earliest times the propriety of admitting evidence for the purpose here stated has been fully recognized. * * *

"When introduced to show intent, or repel the possibility of accident or mistake, the time of occurrence of the collateral circumstance is immaterial. Such duplication of the same situation is just as abnormal after the time laid in the indictment as before. Accordingly it is held that evidence of the collateral circumstance after as well as before the alleged commission of the crime may be admitted. * * * The courts generally use the phrase 'at or about the same time,' but it is clear, we think, that the length of the separating interval, and the fact that evidence of but one other similar instance was here proved, go only to the weight of the evidence, not to its admissibility. * * * In each case the question is, and of necessity must be, whether the evidence tendered has probative effect, logically and under the doctrine of chances. If it has, and we think such is the case here, it should not be excluded simply because it also shows the commission of another crime. This last fact is immaterial."

In the Gosden case, supra, the evidence tended to show that approximately six years prior to the death of his wife for which defendant was then on trial, a former wife of the defendant came to an untimely death under somewhat similar circumstances. We there declared that "Turning now to the questions of law raised by appellant, the first contention made is that the trial court erred in admitting evidence of the death of appellant's former wife, Vivian Taylor Gosden. It is not necessary to repeat the evidence to show the similarity of the circumstances surrounding the deaths of appellant's two wives. This evidence tended to show that each died of strychnine poisoning, each was in-

sured with the appellant as the beneficiary, and in each case the appellant attempted immediately upon the death of the wife to collect the insurance upon her life. The evi- [fol. 2628] dence as to the death of the first wife and the fact that her life was insured with the appellant as beneficiary was properly admitted to show the motive of appellant in the murder of his second wife. (People v. Northcott, 209 Cal. 639, 652, 289, Pac. 634, 70 A. L. R. 806.)"

[6] Nor do we think that in the present case the prosecution was required, as urged by defendant, to prove the elements of the asserted Colorado crime beyond all reasonable doubt, as would be the case were the defendant standing trial for such asserted earlier offense. In this connection it is declared in Lund v. State, 190 N. E. (Ind.) 850, 853, that "It is only the ultimate material facts to which the rule of reasonable doubt applies. The facts regarding the other transactions were simply evidentiary facts introduced for the purpose of being considered, together with all of the other evidence in the case, upon the question of criminal knowledge and intent; and though the jury may have entertained some reasonable doubt as to some of the other transactions, or some of the other items of evidence, which tend to prove guilty knowledge or intent, if, notwithstanding that fact, and having considered the evidentiary facts, doubtful and otherwise, they were convinced beyond a reasonable doubt of the ultimate fact of guilty knowledge and intent, it is sufficient."

In 1914, Ohio adopted a contrary rule when in the case of Baxter v. State, 110 N. E. 456, to which the defendant refers us, it was declared that "Evidence that an accused was guilty of other similar offenses must be such that a jury would be authorized to find him guilty of these offenses." However, defendant has failed to note that in the later case of Scott v. State, 141 N. E. 19, 26, the Ohio court renounced the rule of the Baxter case, declaring: "Is the rule in the Baxter case based upon sound reason? It has long been the general rule that a conviction is warranted if on the whole evidence the jury is satisfied beyond a reasonable doubt that every material element charged in the crime exists and that the defendant is guilty of the crime charged. In other words, it is the holding that the state need not establish each particular fact of the case beyond a reasonable doubt, if it establishes beyond a reasonable doubt the existence of every material fact alleged in the indictment

and the guilt of the defendant. * * * If testimony with regard to other similar crimes is to be dealt with as other evidence, it falls under this general rule and need not be discarded simply because particular items tending to prove other similar offenses are not established beyond a reasonable doubt, so long as the jury, from the whole testimony, are convinced to a moral certainty of the guilt of the defendant of the crime charged and of the existence of every material element necessary to establish that guilt.

"That this common sense view of the situation obtains in certain other American Jurisdictions is shown by the fact that while the case of Baxter v. State, supra, is the leading case which lays down the doctrine here discussed, it is by no means universally followed in its exact terms. While the Baxter Case is frequently cited, the degree of proof required in this class of testimony is held on excellent authority to be positive or substantial, but not 'beyond a reasonable doubt.'"

In effect, we recently held in People v. Thorne, 10 Cal. (2d) 705, 708, that evidence which merely tends to show an attempt to commit or the commission of other offenses is admissible to prove common scheme or plan even though it falls short of proving the corpus delicti of such other offenses. In so concluding, we quoted from People v. White-[fol. 2629] side, 58 Cal. App. 33, 38-41, to the effect that "If viewed with respect to its relevancy as tending to show that the facts constituting the charge contained in the information were a part of a scheme to defraud the public as distinguished from a single individual, it was not necessary in order that Stivers' testimony be admissible that an attempt be shown to have been made to sell him any stock or that the evidence, if accepted as true, should tend to show the commission of an offense like in character to the one charged. * * *"

We also there quoted from People v. Sindici, 54 Cal. App. 193, 196, to the effect that "Where the very doing of the act charged is in issue [as here] and is to be evidenced, one of the essential facts admissible is the person's plan or design to do the act. This plan or design itself may be evidenced by his conduct, and such conduct may consist of other similar acts so connected as to indicate a common purpose including in its scope the act charged. * * *"

In People v. Baker, 92 Cal. App. Dec. 370, 372, it is declared in part that "It is not essential that such similar

transactions shall have resulted in the commission of a crime. It is sufficient if they tend to prove a scheme of the defendant which included the acts charged."

In view of what has been said we are of the opinion that upon its offer of proof of the prior and in many respects similar Colorado incident, the prosecution made a substantial showing tending to prove that on that occasion (as well as on the one here under review) the defendant had financially benefited by the untimely drowning at home of his wife on whom, as here, he had previously procured insurance in which, as here, he was named beneficiary. Upon this substantial offer, later supported by the proof above narrated, the court below correctly admitted the evidence touching the prior incident in order that the jury in its weighing of the entire evidence might determine whether it tended to show a common plan or scheme on the defendant's part or tended to overcome the asserted element of accident involved in the death of the subsequent wife, for which death he was then on trial.

But, even if we assume, as defendant would have us do, that the authorities require the asserted prior Colorado homicide to be proved beyond all reasonable doubt, no prejudice could have resulted to the defendant from the admission of the evidence for the court below, concluding that the rule as is now being assumed, instructed the jury that it must believe beyond all reasonable doubt that defendant's former wife was murdered before it could consider the facts of that transaction in connection with the case at bar. It is to be assumed that the jury abided by the instructions given by the court.

In an effort to show that the deceased was alive on Monday morning, August 5th, when according to Hope's story she was dead, defendant produced a neighbor who testified that when he was in his yard at 9:25 a. m. on said morning he saw a mature, blonde woman, approximately five feet eight inches tall, wearing a rust colored smock, in the defendant's yard; that he had seen a woman in the yard on previous occasions but could not say it was the same one; and that he had never met the deceased nor had she been pointed out to him. Even if it be conceded that the person so described by the witness bore a resemblance to the deceased, the matter was one for the jury to resolve along with all other conflicts in the evidence.

The defendant's sister testified that she visited with him [fol. 2630] and the deceased early in July, 1935, and saw Hope there on several occasions; that she heard the deceased state she desired an abortion whereupon the defendant said Hope would "take care of her". The witness also testified that during 1933-34 the defendant had loaned her several hundred dollars. This evidence was apparently offered for the purpose of overcoming the prosecution's showing that defendant was financially embarrassed and in need of the deceased's insurance moneys.

Defendant also called one of the barbers in his shop who testified he saw the defendant on August 5, 1935 (after the killing but prior to the finding of deceased's body) and that he appeared normal, was not intoxicated and did not exude an odor of liquor. This testimony obviously was intended to rebut portions of Hope's testimony, particularly that part to the effect that during and immediately following the commission of the homicide he and the defendant had imbibed rather freely of liquor.

The defendant also produced a naturalist who expressed his views as to the habits of snakes, their average life when held in captivity and the effect of snake bite upon human beings.

The defendant took the stand in his own defense and denied Hope's story that they had planned to murder, and had murdered, the deceased, by means of rattlesnake infection, drowning, or otherwise. He did testify, however, that Hope came to his home on July 3, 1935, in an intoxicated condition and expressed a desire to stay; that he told Hope to return sober the following day; that Hope, at the time, had with him a box of rattlesnake venom (which tends to corroborate portions of the prosecution's testimony to the effect that Hope was at the defendant's home and possessed reptile venom); that on July 6th, Hope came to his barber shop and again asked leave to stay at defendant's home; that he gave Hope the key and he came that night and stayed several days; that he introduced Hope to the deceased, his sister and his niece as "Dr. Smith"; that at one of the breakfasts the parties discussed the pregnancy of the deceased and deceased during the course of the conversation stated that she could not go through with the ordeal of childbirth and that "Dr. Hope will take care of me" (though earlier defendant had testified he introduced Hope as "Dr.

Smith"); that he saw Hope again on August 3rd (which corroborates Hope's story of being with defendant two days prior to the homicide) but that Hope did not deliver any rattlesnakes to him; that Hope came to his home on August 4th (the day prior to the homicide) to abort the deceased (again corroborating Hope as to being at defendant's home at that time); that he did not approve of an abortion and left home while Hope "cared" for deceased; that Hope left about 1:00 p. m. of that day and he did not see him again between that time and the time of the asserted drowning of deceased the following morning; that while he aided the deceased in taking out insurance on her life he did not do so with any thought of thereafter murdering her and collecting the same; that he did not cause the deceased to write the unmailed letter to her sister, found in the house and referred to above, but in his "confession" had admitted so doing because one of the officers required it; and that on the day before her death the deceased stated to him that she had cut her foot on a tin can while walking barefooted in the yard (this apparently to explain the laceration on her foot which the prosecution contended was inflicted by the fang of a rattlesnake.) On cross-examination the district [fol. 2631] attorney confronted the defendant with his inconsistent statements made to the police on August 7th, two days after deceased's demise, and several months prior to his arrest therefor, to the effect that she had not mentioned a cut or swollen foot to him. Inconsistencies between his testimony and prior statements to friends as to the movements of deceased and himself on Sunday, the day preceding her death, appear in the evidence. In rebuttal of his testimony that he opposed the abortion which deceased assertedly desired, the prosecution recalled Mrs. Pemberton, the friend who was with her husband and defendant when the body was found, whereupon she testified that a few days before the deceased's death the defendant told her (the witness) that deceased was "crazy to have a baby, but I don't want one". We will not undertake to set out additional inconsistencies in statements of the defendant. These were matters for the jury to determine in its consideration and evaluation of the entire evidence. The jury was fully instructed on the law and no complaint is here made of any of the instructions.

The entire record has been examined and all contentions advanced have been considered. Reference to other items

of evidence not here mentioned would neither add to nor detract from the conclusion here reached. Sufficient has been said to illustrate that the verdict finds ample support in the evidence and that the judgment entered thereon should remain undisturbed.

The judgment and order are, and each is, affirmed.

For the reason that Mr. Justice Houser was not present at the time when the argument was heard in this case, he does not participate in the decision thereon.

Mr. Justice Nourse sitting pro tempore.

Dissenting Opinion

I dissent. The Court opinion is so deficient in its statement of the facts to which it refers in general and sweeping terms as supporting its conclusion that it becomes necessary to set forth much of the evidence which was adduced in the case in order to appreciate the kind of evidence, with all of its weird absurdities and vagaries, which must be given verity in order that the judgment in the case may stand. This case makes it singularly appropriate that the familiar rules which cannot be ignored in the consideration of criminal cases be re-stated. A few of these cardinal principles are: that suspicion, however strong, will not justify a conviction of crime; that probabilities alone are not sufficient to sustain a conviction; that a person may not be convicted upon the doctrine of chances, that is to say, that the chances are greater that he is guilty than that he is innocent; that the proof of guilt must be of the character and quality which convinces the mind beyond all reasonable doubt and to a moral certainty of the guilt of the accused; that "a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof. * * *" (Sec. 1111, Penal Code.) Lastly, the evidence must be reasonable and substantial and not of a haphazard or irrational type, or rendered inherently improbable or doubtful by its own unreasonableness. It must bear the stamp of sincerity and truthfulness, rather than bear the impress of fabrication. [fol. 2632] This case presents a perfect illustration of the dangers and abuses which result from a failure in the trial

of criminal cases to adhere to the age old rules and maxims of criminal jurisprudence, which are cherished next only to the Magna Charta as safeguards of life and liberty when either is placed in jeopardy by an accusatory process. At least six major issues, including two entirely different alleged attempts to take life by different methods, were injected into the case, which no doubt greatly influenced the jury against the defendant in the consideration of the evidence relevant only to the commission of the crime charged in the indictment. This evidence no doubt created such strong prejudice against the defendant that it is extremely questionable that the jury was able to withstand its influence and calmly and dispassionately weigh the credibility of the witnesses by the application of "the rule of reasonableness", or to observe the presumptions and inferences with which the law clothes all persons charged with the commission of a public offense. Other errors which we deem equally as prejudicial to the rights of the defendant as those above mentioned will receive the attention which their importance merits.

Some twenty years prior to his indictment, defendant adopted the name of Robert S. James, and we will refer to him by the name of his adoption. For a period of fifteen years he conducted a barber shop in the city of Los Angeles, in the name of James, and he was known solely in his business transactions and to his friends and acquaintances by the name of Bob or Robert S. James. He is a native of the state of Alabama, and was a member of a large family consisting of a mother, brother and several sisters. Numerous collateral relatives on both sides of the parental tree constituted the gentry with whom he spent his early boyhood days, in hard circumstances of poverty, in a rural community. His father, who was an itinerant watch and clock repairer, latterly drew apart from the mother and the children, and the latter, being left in the mother's care, were compelled by force of circumstances, in every instance, to leave their home at early ages and find employment in order to maintain themselves and the household. The defendant's school advantages were very scant. At an early age he worked in cotton mills, a coal mine, and, finally, with the assistance of relatives, he was enabled to attend a school conducted for the preparation of young men who planned to engage in the barbering business. He followed this trade —except for the time he spent in the service during the

World War—from early manhood to the time he was formally charged with the murder of his wife, Mary Emma James, on May 6, 1936, at the city of Los Angeles where he conducted the usually appointed barbershop, consisting of three or four chairs, with a beautyshop stall or apartment, located at 522 West 8th street, a business district in said city. His patrons consisted of persons engaged in business in the area in which his shop was located, and the general public desiring the services of a barber. Among his patrons were several life insurance agents or representatives of life insurance companies, who were on cordial terms with him. They had frequently requested him during years of business contact to give them the names of his customers who might likely become interested in life insurance. The defendant, in several instances, interested himself in their behalf by assisting them with information and using his good offices with his patrons in procuring ap- [fol. 2633] plications of desirable prospects for life insurance policies in the several companies represented by said agents. There is nothing in the record which tends to indicate that he did not conduct himself and his business in an orderly and businesslike way, until after he became the special subject of a most intensive investigation conducted by the district attorney's office, aided by a dozen or more investigators attached to that office working in concert with certain members of the police department and the sheriff's office. The starting point of the investigation is not made certain by any member of the party in charge of the investigating forces but evidently it was begun shortly before the defendant was taken into the personal custody of said officers, and held in detention for several days in a private residence, without authority of law. Not until the alleged confession of the defendant had been procured, which will hereafter be considered, was he formally charged with the murder of Mary James, and officially lodged in the county jail, the place provided by law for the detention of persons held to await trial for the commission of felony charges.

Defendant, Robert S. James, and Charles H. Hope, were indicted on May 6, 1936, and arraigned on the same day. On May 11th, each defendant entered his plea of "Not Guilty" and James entered the further plea of "Not Guilty By Reason of Insanity". The case was thereupon set for trial to begin June 22, 1936. Defendant's application for thirty additional days to prepare for trial and to take the

deposition of witnesses residing in the State of Alabama as to his mental condition, was denied. Counsel entered into stipulations as to the taking of certain depositions and the trial began on June 23, 1935. On the following day Hope was sworn and became a witness in behalf of the prosecution. On arraignment day the Court appointed the public defender as attorney for Charles H. Hope, but as he withdrew his plea of "Not Guilty" and entered a plea of "Guilty as charged in the indictment" on or before the first day of the trial, the public defender appeared in court only at such times as it was necessary for him to join in a request for the postponement of judgment to a day subsequent to the conclusion of the trial of James, which event occurred on July 28, 1936. That Hope's change of his plea and alignment with the prosecution was induced by the hope of receiving some favor or immunity is too self-evident to *re*require argument. The judgment pronounced by the Court upon Hope was imprisonment for "the term prescribed by law". This judgment relieved him of the death penalty. Four days prior to the day judgment was pronounced on Hope, Robert S. James had been found guilty of murder of the first degree, which carried with it the death penalty, and the Court, on September 10, 1936, made a formal pronouncement of judgment by imposing the death penalty on him in accordance with the jury's verdict. The plea of "Not Guilty by Reason of Insanity" was withdrawn and this appeal was taken from the order denying defendant's motion for a new trial and from the judgment of conviction; also upon assignments of misconduct on the part of the district attorney and the Court respectively, during the course of the trial. It is sufficient to concern ourselves only with those assignments which constitute the major grounds of the appeal.

It can be said without fear of overstatement of the fact—if the circumstance is of sufficient importance to merit mention of our judicial records—that in no case which has [fol. 2634] come to the attent' n of this Court for review, in its entire judicial existence, has the spectre of weird, ghastly and unnatural wickedness, from first to last, stalked a judicial proceeding in such hideous forms as are set forth in the presentation of the instant case on behalf of the People. The rule is well settled in criminal law that evidence pertinent to the investigation of a material fact or issue in the case is admissible notwithstanding the fact that

it may tend to reflect prejudicially or unfavorably upon the character or credibility of the person whose acts are under investigation. But the rule is otherwise when it cannot be seen that proof, or proffered proof of an alleged fact or condition, would tend to establish the corpus delicti, or prove a single fact material to the case, but which, on the other hand, would have the effect of producing a state of mind that would render it less probable that the verdict would reflect the calm and dispassionate consideration of the jury unbiased by repeated references to improper matters.

Lord Chief Justice Hale's admonition uttered many years ago as to the great care and caution that should be exercised in the examination of those accusations and acts, detestable in nature and which are easily made and hard to be defended against, has been adopted as a canon of our American law. He said in part: "* * * the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over-hastily carried to the conviction of the person accused thereof by the confident testimony sometimes of malicious and false witnesses." Doubly aggravated becomes the error where matter of the ineffaceable type is emphasized by frequent and vehement references both in the evidence and in argument. The reason for the observance of the rule which excludes all allusions to highly prejudicial or defamatory matters—true or untrue, and whether expressed in words or by exhibits—is that the minds of the investigators may be free to weigh dispassionately close and vexatious questions of fact unaffected by prejudice or hatred arising out of extraneous matters. It is not only the theory but the mandate of the law that every person accused of crime is entitled to be tried by a jury charged with the duty of making an earnest effort to resolve every reasonable doubt, intendment of law, and presumption of fact in favor of innocence, where it can reasonably be done, and where two opposing conclusions may be drawn from a given statement of facts, the one leading to innocence should be adopted, and the other, leading to guilt, should be rejected. The minds of the jurors must be kept free and uninfluenced by any matters or things which will tend to hinder them in strictly following the law in the discharge of this important office. The degree of harm or damage that may ensue by the violation of this age old rule of law is relative to the particular

or kind of acts which constitute the particular crime under investigation. From what has been said we do not mean to imply that facts which are admissible under the law are to be excluded from the case because of any inherently prejudicial quality which they may possess, but we do say that if the offense is of such a nature that it must, from necessity, arouse in the mind of the average person a deep sense of aversion to a person charged with the commission of such offense, that circumstance does not give the prosecution the right to add other prejudicial matters which bear no proper relevancy to the crime charged, and which would thereby [fol. 2635] place the defendant in a more unfavorable light in the eyes of the jury, than he would have stood had the inadmissible evidence not been injected into the case.

It is appellant's contention that the double theory adopted by the prosecution as to the manner by which the life of Emma James was planned to be taken, first by the rapid and effective method of drowning, and secondly, by the much slower and less certain method of bringing about her death by the venom of a rattlesnake, are too self-contradictory, inconsistent and absurd to form a common basis, and the two theories with their weird ramifications were invented and built up for the sole purpose of fomenting a state of irremediable hostility and ineffaceable prejudice in the minds of the jurors against the defendant, and were intended to serve, and did serve, as grounds for depreciatory allusions and references to matters which could not have been of the least assistance to the jury as aids in arriving at the truth of the charge. One rattlesnake was not deemed sufficient to execute the asserted fiendish purpose of the accused, according to co-defendant Hope, but three or four were obtained by him notwithstanding no claim was made that the deceased was bitten by more than one, and only one of the two fangs which rattlesnakes normally have, produced any mark upon the toe or body of the deceased, and that was on the underside or bottom of the toe.

The final theory of the prosecution is that the deceased came to her death from drowning by the criminal act of James. What part James took in accomplishing her death by drowning is left to speculation and conjecture. The bite of a rattlesnake is offered as a contributing cause of death. The cursory examination made by the autopsy physician showed that her lungs contained an unusually large quantity of water. When found, the upper part of her body was

slightly beneath the surface of the water in a lily or fish pond. It requires no expert evidence to establish the commonly known fact that drowning takes place within a very short time upon submersion of the human head, and in far less time than is required for the venom of a rattlesnake to be carried through the blood stream from the toe, where the circulation of the blood is more feeble than in any other part of the human body, to the vital organs and cause death, even in those cases in which death ensues.

What aid the two live rattlesnakes which were brought into the courtroom, rattling and writhing, and thus exhibited to the jury, could have been to the jury in determining the cause of death on any theory, does not appear from a painstaking examination of the entire transcript of the proceedings, and we feel satisfied that the spectacular exhibition of the rattlesnakes, in the circumstances to be hereafter noted, unquestionably constituted prejudicial error.

Rattlesnake venom, even when it proves fatal, is slow in action compared with the quick and decisive method of death by drowning. It will be kept in mind that the evidence as to the use of rattlesnakes, as a means of producing death was certainly a highly controversial issue, which rests wholly upon the word of Hope, an accomplice, whose testimony is not sufficient to support a conviction unless it is corroborated to the extent required by section 1111, Penal Code, and that issue was opposed by the only other witness to the alleged fact, the defendant, who unqualifiedly denied Hope's testimony as to the part rattlesnakes were made to play in hastening or having anything whatever to do with [fol. 2636] the death, or with any attempt to encompass the death, of the deceased. If Hope's testimony on this issue should be discredited, it would necessarily tend to impeach him generally. The rattlesnake issue is important for the further reason that a person who causes rattlesnake venom (poison) to be injected into the blood stream of a human being would be guilty of first degree murder in the event it actually caused death. In all likelihood the person so causing the death would be condemned to suffer the death penalty by virtue of the provisions of section 189, Penal Code, which provides that "all murder which is perpetrated by means of 'poison' or 'torture' is murder of the first degree, or under the general rules of law which pre-

scribe that all murder committed in an unusually cruel manner is murder of the first degree and subjects the perpetrator to the death penalty, at the discretion of the jury trying the case. We mention the penalty because a great deal of evidence was introduced in the case in support of the theory that the deceased, who was six weeks advanced in pregnancy, and had suffered from nausea, dizziness, and kindred symptoms of pregnancy to a degree that she became unusually miserable and discouraged as to her ability to pass through the ordeal of childbirth, may have come to her death by an attempted abortion practiced by Hope, with the assistance or connivance of James. The theory of accidental death caused by falling in a fainting spell, or by self-infliction also were issues which the defendant had a right to have the jury pass on.

If death ensued as the result of an attempt to commit an abortion, the degree of crime would not be higher than murder of the second degree, the maximum penalty being life imprisonment. Thus the penalty for criminal abortion was commensurate with the term meted out to Hope under his plea of guilty. We mention this matter in view of the Court's instruction to the jury that if it returned a verdict of guilty, it could not be less than murder of the first degree, and also as bearing on the reference made to the punishment of abortion during argument of counsel for the People as tending to buttress Hope's righteous motives; further, its tendency to render less effective the inferences which the defense was entitled to draw by reason of the delay in passing judgment on Hope's plea, which was early changed from "Not Guilty" to "Guilty", until after he had testified and the jury had rendered its verdict in the James case. Counsel for the People in decrying the abortion theory in his argument to the jury stressed the point that if the abortion story was true, Hope would have been a foolish man to have entered a plea of guilty of murder of the first degree with a possibility of suffering the extreme penalty in view of the principle of law that if Mrs. James died "as the result of an abortion to be performed on her by Mr. Hope, the very most that Mr. Hope could be guilty of, under the evidence, would be murder of the second degree, for which his life is not in jeopardy". At this juncture counsel for the defense interrupted with the objection that counsel had no right to instruct the jury as to matters

of law. The Court agreed with the objecting counsel that the jury must accept the law as given by the Court, but in so doing said that in view of what the deputy district attorney had stated the law to be "the Court informs the jury where an illegal operation is performed and death is a result therefrom and is caused thereby, the person performing such illegal operation is guilty of second degree murder". The jury was not instructed and therefore did not [fol. 2637] know that punishment for second degree murder might equal in terms of years the punishment prescribed for first degree murder, which is imprisonment for life. That was the punishment imposed on Hope for the part he took in a homicide which the prosecution in its argument denounced as equaling the foulest crime that blackens the pages of our criminal calendars. The effect of the incident above referred to was to bolster up and support Hope's testimony on the theory that if death was in fact caused by an attempt to perform an abortion, he would not have thrown away an opportunity to avail himself of that defense, and thereby preclude the possibility of the infliction of the death penalty. It is convincing beyond all question from the vigorous and vehement manner in which the death penalty against James was urged at every stage of the proceedings as the only verdict that could vindicate the law, that an offer on the part of Hope to plead guilty to second degree murder, if made, would have been rejected inasmuch as it would have tended to weaken the theory on which the death penalty was urged against James. Such a plea would have practically committed the prosecution of James to the abortion theory. The defense insists that its claim made throughout the trial, which in substance was that Hope was induced by promises that if he would change his plea of "Not Guilty" to a plea of "Guilty", and align himself with the prosecution, said officers would use their best efforts to relieve him of the extreme penalty, was weakened, if not destroyed, by the trial incident referred to. It is contended that it put Hope in the favorable but false light of having been moved solely by the promptings of conscience, and not at all induced by promises or understandings that his life depended on his performance as a witness, and being so moved, he voluntarily decided to tell the truth at the risk of forfeiting his life, rather than to stand on a defense which would have absolutely barred the imposition of the

death penalty. Later the abortion theory, of which there is much evidence, was erroneously, we think, ruled out of the case by the Court instructing the jury that there was but one of two verdicts that could be rendered, to wit, murder in the first degree, or not guilty of any crime. Consideration will be given later to the evidence bearing on this issue.

We are confronted in our examination of this appeal with a record of tremendous proportions, larger by far than is necessary to present every substantial question which merits serious consideration. Much space is devoted to ultra sordid and sensational subjects, many of which transgress the limits of rational conduct. The transcript of testimony contains more than two thousand five hundred pages of typed matter and the clerk's transcript exceeds two hundred pages, not to include voluminous printed briefs. This being a case in which the death penalty was imposed, and for the further reason that so many strange and inexplicable acts and incongruous situations are set forth as forming a part of the plan to take the life of the deceased, we deemed it our duty to assume the laborious task of making a careful examination of the entire record. It includes not only the proceedings had in the single charge of murder, alleged in the main case to have been committed August 5, 1935, the consummation of which the prosecution had advanced two theories, one being that Mary James met her death by drowning, accomplished by James, the motive being to collect on certain life insurance policies issued on [fol. 2638] her life in which he was the beneficiary; and the other theory being that James, with the assistance of Hope (whose part in the homicide is left in an equivocal state as to whether he acted with the criminal intent in the commission of the specific homicide alleged in the indictment or whether he believed he was aiding and abetting a plan to murder a different and unnamed person) aided in accomplishing her death by thrusting her left foot into a box containing a rattlesnake procured by Hope at the behest of James, whereby her toe was bitten by said snake, in furtherance of the plan to cause her death by rattlesnake venom. The record also contains evidence which has to do with a different and distinct crime committed in another state, some four years prior to the crime alleged in the indictment, which evidence the People claim proves, beyond a reasonable doubt and to a moral certainty, that James, being

prompted by a similar motive, conceived and executed by the adoption in part of similar methods, did, on September 21, 1932, attempt to murder, and a few days thereafter, to-wit, October 14, 1932, in the State of Colorado, succeed-- in murdering his former wife, Winona James, commonly known as Nona James, he being the beneficiary named in insurance policies issued on her life.

At the time of Winona's marriage to the defendant, she carried insurance policies on her life aggregating the sum of $9,000 payable in case of death by natural causes. One of said policies which paid a death benefit of $5,000 also provided double indemnity in case of accidental death. James was made the beneficiary in said policies, as he was in the policies afterwards issued to Mary James. He was paid double indemnity on the $5,000 policy on Winona's death, proof of accidental death being satisfactorily established. The sum total which he received as beneficiary under said policies issued to Winona amounted to $14,000.

On September 21, 1932, a few days after the marriage of Winona and James, he and his wife set out on a trip by automobile, to visit James' former home in Alabama where a number of his near relatives resided. A number of his wife's relatives resided near Manitou, Colorado, and they planned to stop on their journey to visit with them. While there, they took a trip as they had planned to do, to Pike's Peak. While descending the peak not far from its summit, (appellant's theory) the wife driving the automobile, lost control or failed to properly direct it, and it left the tortuous, steep and somewhat narrow gravelled road-bed and was precipitated a considerable distance down the mountain side before it became lodged against a large granite boulder. James, who according to his story, was viewing the scenery at the close of day with the aid of field-glasses, jumped or was thrown from the car and received minor bruises and an injury to his back. Mrs. James being unable to extricate herself from the perils of her position suffered severe fractures of the cranial structure as a result of her occupancy of the car. She was taken to a hospital at Colorado Springs where she received medical care. She regained consciousness on the following morning and when her condition warranted, she was taken to a cottage which the defendant had rented and where he remained with her until she was found around 4:30 or 5:00 o'clock in the afternoon, by her husband, lying drowned in the bath tub, upon

his return from a trip to the business district of Manitou, accompanied by the local delivery-man who was making a delivery of provisions purchased by James. The grocery [fol. 2639] store was approximately one mile from the James cottage and James had on previous occasions ridden with the delivery-man in making deliveries to the cottage. The cause of death was examined into by the county coroner and the officials who are charged with the duty of examining into the causes of death in such cases and no suspicion of any criminal agency was hinted at until April, 1935, some three years after the murder is charged to have been committed, and some eight months after the death of Mary James of whose murder the defendant stands convicted. It seems that the investigators of the district attorney's office for some time had been working on the theory that the defendant had murdered his wife. It came to them from some source that the defendant and Lois Wright were living together in incestuous relations. It was in the investigation of the incest charge and from information furnished by Madge Reed, whose connection with the case will later be considered, that the indictment was found. The investigators of the incest charges, which resulted in three convictions, and the murder charge involved in this appeal, and the murder of Winona, claimed to have been committed in the jurisdiction of Colorado, were developed together by the investigators attached to the district attorney's office, working in conjunction with certain members of the Los Angeles police force and the sheriff's office. James was taken into custody at his home, No. 3886 South La Salle avenue, and was held in detention in a privately owned residence, No. 3882 South La Salle avenue, located next door to his home, under the exclusive control of the prosecution's forces. In this house a dictaphone had been installed for spying purposes, operated under the direction of Police Officer Everett E. Kynette, the head of the "Spy Squad". The means by which the evidence was obtained to effect James' conviction on the incest charges does not appear, but it is probable that it was accomplished with the use of the dictaphone apparatus and the spy system which was admittedly operated from the house in charge of the investigators located next door to the James home.

It would not be within the reasonable observance of the limitation of space or time to attempt anything resembling a complete review or analysis of the evidence introduced

into the case. In fact, it would be practically impossible to harmonize much of the testimony given by the prosecution's chief witness, Hope, with a course of rational conduct. The motive which might prompt the commission of crime ordinarily discernible in every criminal case, is unquestionably present in the instant case, but the evidence amassed to prove the plan of execution takes such a wide departure from a normal course of conduct, making due allowance for the abnormalities of the criminal minded, as to require close scrutiny of the testimony of the witness upon whom judgment of conviction must ultimately stand or fall, as tested by the rule of reasonableness and examined in the light of the strength of the evidence relied upon to support the indictment.

There is little in the record which sheds light on the background of Hope's life. He was thirty-seven years of age at the time of the trial, and testified that he was married. He testified that during the year immediately prior to the trial he had been engaged in the business of "building maintenance" without stating the nature of that business or where he was so engaged. He spoke of having been engaged in business at Pomona during his acquaintance with James but when asked by counsel for the defense the kind of business he was engaged in an objection to the question [fol. 2640] interposed by counsel for the prosecution was sustained on the ground that the question was immaterial. It appears by affidavits that he is an ex-sailor and had worked as a floor finisher. It also appears that he had had some kind of employment or connection with a drug concern for a time and that his employment was generally of the casual kind and in the nature of odd jobs. Evidently he was not engaged in any continuous employment and was idle a large portion of his time. He testified that he had known James for a period of seven years and that he had been a customer of his barbershop at irregular intervals and had at other times dropped in to exchange words of greeting. He also had borrowed small sums of money from James and had otherwise sustained friendly relations with him. James had let him use his car on a number of occasions. There is no suggestion in the record that a purpose to engage in a criminal conspiracy to take the life of any person by the instrumentality of poisonous reptiles, or otherwise, existed in the mind of either of the parties, until suddenly and unexpectedly, in the month of June, 1935, as

the two walked from James' barbershop, James said to Hope, according to the latter's testimony, that a friend of his "had a wife who had been bothering him a bit and he was going to kill her and [the friend] wanted to get some rattlesnakes, and laughed about it." Hope corrected the above statement which he attributed to James to agree with the earlier testimony given by him before the grand jury in explanation as to the reason why the friend wanted to kill his wife, to read as follows: "I have a friend who has a wife that is keeping him broke and he wants to kill her. He is going to kill her with a rattlesnake." He further corrected his testimony to agree with his grand jury testimony, to read: "He (James) said this man will give you $100 to buy these rattlesnakes."

It is the testimony of Hope that he did not know the identity of the woman thus marked for death but he nevertheless set about to procure and did procure rattlesnakes which he believed were to be used in the commission of a murder for which he expected to receive the sum of $100. Hope testified that he did not know the snakes were intended to be used as a means of killing Mrs. James until a very brief period before he assisted James in carrying the box containing the rattlesnake into the dining room, where, as he described, Mrs. James was lying on her back, strapped to the dining room table with her limbs extending beyond the edge of the table, and with strips of adhesive tape pasted across her eye-lids and over her mouth, with no garment on her body but a night-gown, partially upraised.

That Hope was at least given to the inordinate use of alcoholic spirits whenever obtainable is apparent from the evidence. His admissions, if accepted at their face value (but which are in the main repudiated by the defendant), would stamp him as occupying a low plane in the scale of moral perverseness, willing to take life by adopting indescribably wicked and cruel means of torture.

A large mass of evidence in the form of depositions bearing on James' mental capacity and temperamental characteristics as exhibited in his adolescent period and during his early manhood, was injected into the case by the attorneys for the defendant, primarily offered as tending to show that he was congenitally a weak-minded and incompetent person.

This testimony was primarily offered for the purpose of affording grounds for the exclusion of any testimony bearing on the purported confessions made to the investigators, on the grounds that James was a person without [fol. 2641] sufficient understanding and lacked the mental capacity to appreciate the import and effect of the alleged statements, or confession, which it is claimed he voluntarily made, and that he was mentally unable fairly to protect himself without the aid or advice of someone against the methods applied by the massed forces of trained and experienced investigators. This testimony, in the main, had very little, if any, relevancy to the commission of the specific act charged against the defendant, and it was not in itself sufficient to show that he was a person who, under normal circumstances, was unable to appreciate the common affairs of life. Whether he was a person who would be more likely to fall a prey to coercive methods than the average individual was a proper matter for the jury's judgment in the light of all the circumstances shown by the evidence, whether direct or deducible by reasonable inferences from proven facts. The mental capacity of a witness so far as it affects understanding or the intent of the person whose act is the subject of inquiry, is always a matter for the jury's consideration. The evidence was not of the kind, however, that would excuse the commission of a homicide on the ground that the accused was insane. The evidence bearing on the formative periods of his life disclosed both commendable characteristics and acts of youthful folly, neither better nor worse than those which might be expected to mark the conduct of the average boy reared under similar circumstances. It may be noted that it appears that he married in early manhood and whether this first wife died or the parties became divorced is not made clear. Whether the marriage was dissolved by death or divorce is not relied upon as a material issue in the case. It further appears that the defendant was a fancier of, and, at times, was the owner of, game chickens and a particular breed of bulldogs.

His acts with respect to matters that occurred during his maturer years will hereafter receive such notice as their relevancy may seem to require.

We are now brought to a consideration of the evidence which has a direct bearing on the specific marder alleged in

the indictment, to-wit, the alleged felonious killing of Mary Emma James, with malice aforethought.

Mary Emma James' name before marriage was Mary Emma Busch, and she was a beauty parlor operator. She was a woman evidently in her thirties and James was approximately forty years of age at the time they were married. Mary Emma Busch, to whom we shall also refer to as Mary or Mary James, entered the employ of James in March, approximately five months before she was discovered dead, August 5, 1935. She and Miss Viola Lueck, who since the death of Mary James, married James Pemberton, had been companions and intimate friends for approximately two years prior to the marriage of James and Mary Busch. Miss Lueck was an employee of the telephone company. She met James for the first time the next day after Mary Busch (Mary James) had become acquainted with him. She and Mr. Pemberton were engaged to be married during the period of time immediately preceding Mary's death, and it had been arranged that the wedding was to take place at the James home. Naturally a relation of cordiality and friendship existed between James and wife on the one hand, and Mr. Pemberton and his intended bride, on the other. Mutual social relations existed between the two couples, and exchanges of social courtesies were quite frequent. The James home was located at 1329 West Verdugo road, La Canada, county of Los Angeles. The home [fol. 2642] was pleasantly situated and was built in cottage fashion. The yard was planted to garden grasses and contained shrubbery, flowers and a few orange and fruit trees. A lily pond occupied a part of the front yard. Cement walks led to and around the pond and walk-ways meandered the gardens. A garage, a chicken pen, in which some four dozen chickens were kept, and a yard in which three dogs were kept, constituted the rear of the premises. The house appears to have been located in an attractive sylvan district.

Mr. Pemberton and Miss Lueck had visited Mr. and Mrs. James on Wednesday evening, July 31, five evenings prior to the finding of Mrs. James' dead body. At that visit the celebration of the Pemberton Lueck wedding was discussed. It was arranged on that evening that the James were to take dinner with Miss Lueck and Mr. Pemberton at the apartment house where Miss Lueck was living, on Monday

evening, August 5, provided Mrs. James, who had been suffering from symptoms of pregnancy, was able to come to Los Angeles. If not, they were to dine at the James' home. About two o'clock Monday afternoon, August 5, James called up Miss Lueck at her apartment, and told her that Mary was not feeling well enough to come to Los Angeles and asked her and Mr. Pemberton to come out to his home for dinner. He said that Mary had the vegetables ready, and that he would stop and get the steaks and necessary food on the way to his place. He said that he would meet her in front of the telephone office where she worked at 7:30, after he closed his barbershop. James arrived in due time with Mr. Pemberton, whom he had picked up on the way to meet Miss Lueck. The latter got into James' car and the party drove to a market, where James bought steaks and some cottage cheese. He said the cottage cheese was for Mary in case she could not eat steak.

The three, James driving, arrived at the James' cottage at 8:10 or 8:15 in the evening. He drove into the driveway at the back of the house and parked. Both witnesses, Miss Lueck and Mr. Pemberton, testified that James' conduct and appearance was usual and entirely normal. There were no lights in the house and the doors were unlocked. All the parties entered the house through the rear door and looked into all the rooms, and Mr. James and Miss Lueck called Mrs. James a number of times. Someone suggested that she might have fainted on the grounds and her body might be concealed by the shrubbery. The parties opened the front door and James observed a note under the door which he picked up, stating that someone had been there on that day or the day before. Mr. James read the note aloud. It was written by Mrs. Ethel Smith, James' niece, and left in the crack of the door. Sunday, August 4th, she and her husband, and the father and mother of her husband, had called at about 5 o'clock, and finding no one home, she left the note. The doors were locked and the blinds were carefully drawn. James suggested that a search be made of the yard and he got a flashlight. Pemberton was familiar with the front yard, but not with the back yard. He went into the front yard and James went into the back yard. In his search about the grounds he followed a narrow walk which led through the shrubbery to the side of and skirted the fish pond. At this point he discovered Mrs. James' out-

stretched body. The lower limbs were resting across the narrow cement walk which was close to the water's edge and her head and upper part of her body extended into [fol. 2643] and was slightly submerged beneath the surface of the water, her face facing downward. He made an exclamation and went to the rear of the house to meet Mr. James. He told him to brace up, that he had a "shock". He told him Mrs. James was dead. He attempted to prevent Mr. James from going to where the body lay but he was unable to do so. James knelt down beside the body and tried to lift her from the water but was unable to do so and Pemberton assisted him in pulling the body back so that the head was clear of the water. He finally got Mr. James up and he had Miss Lueck take him into the house and he left to notify the sheriff's office at Montrose. Mrs. James was described by him as wearing pajamas Miss Lueck also said she had on pajamas and bedroom slippers. The light wire fence which enclosed the rather shallow pond was crushed at the point where the body had lain. The pond was approximately twelve or fourteen feet in dimensions and the water was from ten or twelve to sixteen inches in depth, the bottom being covered with cement. Miss Lueck testified that James was moved to tears and kept repeating, "Oh, I am so sick; what will I do without her." He was apparently deeply grieved and was taken to a couch in the yard where he was apparently prostrate for some time. A physician who had been summoned to the home administered to Mr. James. He was afterwards taken to the place where Miss Lueck lived and given such care as his condition seemed to require. That his grief had all the appearance of being genuine and not simulated is testified to by Miss Lueck and Mr. Pemberton who were in close social relations with James and his wife, and by all who were in a position to have had any knowledge of the subject. The testimony is to the effect that James was kind and affectionate in his treatment of his wife and both seemed happy in their marital relations. The home was pleasantly appointed and the grounds are described as being exceptionally beautiful.

In going through the house in search of any message that Mrs. James may have left, or any evidence which might throw light on her death, Miss Lueck discovered in a dish or bowl on a table in the dining room, a sealed blue envelope addressed in pencil to Mrs. James' sister, Mrs. R. H.

Stewart, Las Vegas, Nevada. She called Mr. James' attention to it and he requested her to open it. The letter was written in pencil on blue stationery, corresponding to the envelope, and was in the following words:

"Dear Sis.

"Just a line this morning to let you know I am pretty sick. My leg is all swollen, something bit me while wattering my flowers this morning. I cut my toe yesterday and having lots of bad luck, this is old blue Monday, but my daddy will be home early to nite and he takes good care of me.

"Be sure and write me soon and Ill let you know how I get along. Sis."

On the back of the envelope is written: "From Mrs. R. S. James, 522 W. 8th St. Los Angeles."

The letter is concededly in the hand of Mrs. James but it is claimed that it is not written in the legible and steady hand which usually characterized her hand writing as shown by exemplars.

It is the contention of the prosecution that the letter was written under the compulsion and dictation of James or as Hope's testimony would indicate, at a time when she was under the influence of intoxicating liquors. Hope's testimony was that Mrs. James drank large quantities of [fol. 2644] whiskey during the last hours of her life. James testified that she never, at any time, drank any liquors and further, that she was continuously suffering from nausea and dizziness caused by pregnancy, and it was with difficulty that she could retain any kind of food or fluid on her stomach. She had consulted Dr. James De Witt George, an obstetrician and gynecologist of the city of Los Angeles twice as to her condition, first on July 16th at his office and again on July 30th, five days prior to her death, at her home. The physician testified as to her pregnancy and as to symptoms of nausea and sleeplessness. He prescribed for her.

In further refutation of the alcoholic indulgence told by the accomplice Hope, the autopsy physician, Dr. F. A. Wagner, who made a chemical test of the stomach and kidneys the day following death as to the presence of alcohol, reported that he found none. At the time he held the autopsy he reported death from drowning. He also reported acute

cellulitis of the legs. Cellulitis is an inflammation of the cellular tissues. No suspicion existed in the mind of anyone that Mrs. James' death was caused by criminal means until several months thereafter. The body was exhumed nine months after burial and a re-examination of it was made after the Hope rattlesnake theory had been advanced by the investigator in the case. Dr. Wagner had given no thought to the rattlesnake theory until the subject was pressed upon him by one or more of the investigators. With this suggestion in mind he reconsidered his former report. He performed the autopsy on the day next following the day her body was found as heretofore related. He testified that he found a laceration on the under surface of the left great toe. The left leg was considerably swollen. The lungs contained a considerable amount of water. There was no disease of any of the vital organs. The uterus showed a normal pregnancy of proximately six weeks duration. Superficial bruises, showing black and blue spaces of varying extent were found on certain parts of the body.

A chemical analysis of the stomach, liver and kidneys did not react to, or show the presence of any poison. He defined "acute cellulitis" as a swollen or inflamed condition of the tissues. He said "it may be due to anything of a micro-organic nature". The discoloration of the leg was quite marked to the knee. The swelling continued to the hip. The bruises or contusions upon the body were on the chest and the interior portion of the right arm and extended to the back of the arm. He noticed slight bruises or scratches on the forehead and face. Evidently the witness in describing the body and its condition was using, for purposes of illustration, a photograph taken after the body had been disinterred, and it is not clear in some instances as to whether he was testifying to the condition that existed at the time of the autopsy or as it existed after it had been exhumed nine months later. His first examination was cursory merely. That physical and organic changes of the body must have taken place during its long burial period would be an inevitable result. When the body was brought into the morgue after nine months' burial the skin had slipped from the left leg. The doctor stated that cellulitis (which is medically defined as inflammation of the cellular tissue) was the result of bacterial action. It was due to

an infection of some kind, animal or vegetable. It could have been caused by the bite of a rattlesnake, venomous insects or spiders, or by the inoculation of vegetable bacteria. The notes taken by him at the autopsy, he said, were [fol. 2645] very brief. Asked whether he had reached any opinion as to what had caused the incision on the bottom side of the toe, his answer was, "Not a definite one, no sir." He had never seen a puncture made by the fang of a rattlesnake, nor had he ever seen anyone who had been bitten by one. He described the puncture as resembling one made by a nail or any other ordinary pointed instrument. The laceration was about a quarter of an inch long and led away from what he thought was the point of entry. He was of the opinion "that one *could* come to the conclusion that it *could* have been made by the bite of a rattlesnake". It was possible that it could have been made by a thorn. He said that he had definitely formed the opinion that there was a puncture but it is quite manifest that he paid but little if any attention to the laceration at the autopsy and made no special examinaion of it. He made no attempt to determine whether the cellulitis was caused by vegetable or animal bacteria. In giving, on direct examination, his conclusion as to whether the puncture or laceration was made by the fang of a rattlesnake or by some other means, he said: "From the description of the bite as shown in the literature [and the condition described by the witness] one *could* come to the conclusion that it *could* have been made by the bite of a rattlesnake or anything else that would have a similar instrument for making such a puncture or laceration." He was then asked: "Q. Did you reach such a conclusion? A. I did." As to whether the cut on the toe was made by stepping on a nail, thorn, or was made by coming in contact with any other sharp instrument was not of itself a question of expert evidence. The doctor suggested that he was no better qualified to testify on that subject than a layman would be. On redirect, the doctor said the cellulitis was more like that caused by venom or poison than the growth and development of a toxin of bacteria. He further said there was evidence of a gangrenous condition. The doctor was not positive as to what caused the condition found on the leg. He could not say the condition he found had not been caused by the bite of a black-widow spider or other poisonous insect.

Dr. Gustave F. Boehme, called as a specialist on the habits of rattlesnakes and snake venom, and who had himself been bitten by a rattlesnake and had treated a patient who had been so bitten and had seen others who had been bitten, made an examination of the body of Mrs. James with Dr. Wagner May 5, 1936, nine months after burial. Superficial material which had accumulated on the limb was removed. The left leg was very much enlarged as compared with the other leg and it was markedly discolored, almost mahogany in color. There was some swelling on the lesion from the knee to the hip. Running across the great toe he observed an old laceration about a quarter of an inch in length. "So far as the wound itself was concerned," the witness continued, "it *could* have been caused by laceration; it *could* have been caused by snake bite; it *could* have been caused by *some other method*, but combining it with other findings in that, I did come to an opinion." "Q. What is that opinion? A. That opinion was that *probably* this woman's toe had been bitten by some venomous creature, *probably* a snake, and all the findings on the leg were *compatible* with such a finding." The specialist testified that the venom of a snake (no doubt the same law would apply to all other venomous insects and members of the reptile family) travels "by the lymphatics" and not so much by the blood vessels which causes progressive [fol. 2646] localized swelling. The venom acts on the blood vessels to produce large black and blue areas. From the physical findings corresponding to a snake bite on the woman's leg, the witness concluded it was a *probability*. (All emphasis added.)

The single laceration, instead of two (rattlesnakes have two fangs) and the position of the laceration on the bottom of the toe, the specialist said, could be accounted for "by the fang striking at an angle, *perhaps*". The witness testified that when the fangs of a rattlesnake enter those parts of the human anatomy where the blood vessels are large and numerous the venom is more rapidly absorbed and carried to the vital organs than it would be if injected into the toe. Swelling following the injection of poisonous reptile virus becomes perceptible from two to four hours thereafter. In cases where it proves fatal death usually ensues from sixteen to twenty-four hours unless the progress of the poison is arrested. Of course, much depends upon the

amount of virus injected, the physical condition of the person, and the part of the body into which the virus is injected. Over the objection of the defendant, the witness, Dr. Boehme, testified that on May 5th, nine months after Mrs. James' death, Snake Joe, extracted the venom of two rattlesnakes (one of which it is claimed was in the box into which Mrs. James' foot was forced), and the witness gave in detail the process by which it was extracted from the fangs, and injected by him into the bodies of two guinea pigs. He described minutely the manner in which the guinea pigs died. The squeal of pain, twitchings, convulsions and final death struggles which followed the injection of the venom were dramatically told. The guinea pig lived twenty nine minutes. The second, which had a lighter solution of venom injected into its body, showed similar symptoms. It died in one hour and twenty-nine minutes after injection, writhing and twitching in pain. The injection was made in the interior abdominal wall. An examination was made and the walls of the abdomen were found to have turned black and blue and the intestines were in sharp contraction, and were also black and bluish, or discolored. The stomach presented the same appearance. The lungs held a large amount of blood and the heart was contracted. The heart, lungs, kidneys and stomach of Mrs. James, were, according to the autopsy physician, normal and showed none of the signs found in the guinea pigs, as described by the doctor who performed the guinea pig autopsies. As between the bite of a black-widow spider, a tarantula and a rattlesnake, the witness said that the condition of Mrs. James indicated that it was caused by the bite of a rattlesnake. The doctor testified that where the fang of a rattlesnake enters the flesh there is an area of suppuration or festering about the wound. The history was obtained from Dr. Wagner and from what he saw, the wound did not indicate suppuration. He was then asked if the absence of suppuration did not indicate that the wound was caused by something else other than a rattlesnake bite and his answer was: "Well, it may have been some other,—produced by some other instrument that was not infected." Dr. Wagner when asked whether the condition he found was of the nature of bacteriological infection or of the venom type said: "It was more like that which is caused by a venom or poison rather than the growth of and development of a toxin of bacteria." He said he found nothing which would

tend to contradict a story of infection by snake bite, but on the other hand, he did not say that he found a condition [fol. 2647] that would justify him in concluding that only the venom of a rattlesnake could have produced the condition which he described; nor was he willing to say that the condition he saw could not have been caused by numerous and common bacterial infections which are wholly separate and apart from venom poison. He did see evidence of a gangrenous condition. There was nothing so unusual as to the appearance of the body when the autopsy was made as to excite more than passing notice. No chemical test of microscopical examination was made at any time to determine the nature or cause of cellulitis.

The testimony of the two expert witnesses called by the People to prove or demonstrate that the condition which they described had its origin in or was caused by rattlesnake venom or any one of the many other potential causes, is so vague and indefinite as to unmistakably disclose a state of grave doubt and uncertainty on the part of the witnesses as to whether the condition which they describe as cellulitis was the result of a snake bite, or was produced by any other of the many causes known to medical science. Their testimony as to this issue, even regarded as opinion evidence, is so weakened by qualifications, such as "it could have been", or "might have been" caused by rattlesnake venom, and by indulging in possibilities and probabilities as to reduce its evidentiary value quite to the level of conjecture and speculation as to what did cause or may have caused, a condition which is neither unusual nor uncommon in the practice of medicine. Mrs. James was some six weeks advanced in pregnancy and there was evidence, given by the defendant, it is true, to the effect that she was in the habit of taking off her shoes during the warm August days and walking about the walks and yard, and she had mentioned the fact, according to James, that she had stepped on something which had cut her toe. This is in accord with the reference made in the letter addressed by her to her sister which the prosecution contends was written by Mrs. James at the dictation of James while she was intoxicated.

It is not disputed that the condition as described could have been caused by the entry of toxic or bacterial poison through a laceration or cut of the flesh however made. The truth or falsity of James' testimony was a matter for determination by the jury in the exercise of its discretion as

subordination to the rules of evidence. Excluding his testimony entirely as to this issue, the question is, however, as to whether there is substantial expert evidence to support the contention that the cellulitis was caused by the bite of a rattlesnake. Giving full import and significance to the language contained in the record, it is apparent, as a matter of law, that it is too uncertain, indefinite and doubtful to establish the fact for which it is offered, unaided by corroborating evidence from other sources. The prosecution must therefore look to the testimony of Hope or the alleged confession of James for substantial corroboration.

In reviewing the story as related by Charles H. Hope, sometimes called "Chuck" Hope, we will adopt his language and method of expression as nearly as it is feasible to do, resorting to quotation points only in such instances as it may appear necessary to express the exact meaning of the witness.

We have already spoken of his plea of guilty entered soon after the trial began and the judgment of life imprisonment imposed upon him at the conclusion of the James trial. Our attention will be directed to a statement and review of his testimony as it appears in the record [fol. 2648] before us with such pertinent comments and references to other evidence or circumstances or instances as may bear directly on the particular issue under discussion. The story as related by him follows: He had known defendant James for a period of about seven years prior to August 5, 1935. During that period he had visited James' barbershop at intervals of from one to two or three weeks either as a customer or in making passing calls when he was not employed. He had borrowed small sums of money from him at various times.

In June, 1935, at the barbershop, out of a clear sky, James asked him if he knew anything about rattlesnakes and Hope said, "No." James asked him if he could find out about them, and Hope said he would try. Hope said James' explanation of his inquiry was that "he had a friend who had a wife who had been annoying him quite a bit and he wanted to get some rattlesnakes, and he laughed about it." James told him if he would get him some snakes he would give him $100. Hope testified he saw him again in a casual way at the barbershop during the later days of June, and James asked him if he had found out about rattlesnakes, and Hope said he thought he could buy some for him. Hope purchased

three from R. H. Kirby, a keeper of a place of amusement and a dealer in reptiles. Hope took the rattlesnakes to his apartment, where he kept them for two days and then delivered them to James, at his home. Hope paid the snake dealer $5 for the snakes. James asked him where he got the snakes and Hope told him it didn't make any difference and left. James gave him $20. He saw James later at the barbershop. Hope was then getting ready to move to a different part of the city. James told him he could come out and stay at his home for four or five days; that he had some work he could do. He went to James' home and stayed there several days. Hope, on James' instructions, had a cabinet maker make two boxes in which the snakes were to be kept, and he was instructed to tell the cabinet maker, if he asked any questions, that they were to keep white mice in. Hope testified that he bargained for two white mice when he purchased the snakes. The boxes were 24 by 9 inches and had a glass sliding top. He paid $5 for the boxes. Hope delivered the boxes to James and he put two snakes in the box for delivery to the man who had a troublesome wife. James told him he wanted a hole cut in the side of the box large enough to permit the insertion of "two fists". Hope said he did not see James again until he called at the barbershop about the middle of July. James told him the man was dissatisfied; he said the snakes were not fighters; that he and his family had been to Ocean Park and saw good snakes there. That afternoon James and Hope went to the Ocean Park snake pit and avoided the appearance of being acquainted.

At this point the witness seemed confused and his testimony was incoherent in some particulars. He said, "When we went to Ocean Park we submitted them and sold them for seventy cents a pound. James asked me if I was busy that afternoon and I told him I was not. So I went down to Ocean Park with him." They then went to the pit and waited for an hour. "I was asking him questions—I didn't hear a whole lot of it, but I did hear from the man that owned the pit say, 'I will bet you $20 there isn't a poisonous snake in the pit.' I went around on the other side as he [James] told me to do and I didn't want anybody to think we were together. * * * I heard Mr. James say to the man that owned the pit as he walked over to my seat and he [fol. 2649] pointed out one snake and said, 'That's the one I want and left'." His testimony that the owner of the

pit made an offer to wager $20 as above set out was later changed to make it read that James made an offer to wager $20 there was not a poisonous snake in the pit at the time. Some confusion as to the Long Beach exchange of snakes brought forth the following questions and answers: "Q. And you gave the snake which you had purchased at Long Beach to the man at Ocean Park? A. Yes, sir. He wasn't there at that time. They had a doctor there. I waited for this man to show up and he didn't show up there. I said, 'We are very hot,' and I said, 'Wait there while I dump this snake—'." What he said to the doctor of undisclosed identity, was stricken out on motion. Hope said he waited until the snake man came and he, Hope, pointed out what he thought to be the snake that James had selected from the pit the day before. The man put it in a box and Hope delivered it to James' barbershop. James paid him $5 for the snake and went home and Hope went his way. When working, Hope occasionally stopped at the barbershop for service or a friendly visit. Hope saw James again after August 3 at his barbershop and James said the snake was "no good". He wanted some fighters. Hope said he had heard that the gentleman at Ocean Park had snakes that were bought of Snake Joe of Pasadena. James said, "Go over and get some if you want real fighters, they fought chickens and dogs." Hope, who said he was furnished by James with explanations as to the purpose to which the snakes were to be put, further said that he was to tell Snake Joe, in order to impress him with the importance of obtaining a poisonous snake, that he, Hope, had lost his money in a poker game—to a person not named—and that he was going to win back what he had lost at poker by betting the man who had won his money that Snake Joe actually had in his snake pit poisonous reptiles.

Snake Joe was called by the prosecution and he said that according to his book Hope was at his place on August 3, and told him he had already bought some snakes from other places, but they were not "hot" and he wanted a real "hot" one and he was directed to him. Hope said that "a friend and he had a bet on, and he wanted to kill a dog and he said if it would kill a dog he would collect quite a bit of money out of the bet and make up on the bet again, and he wanted to get 'hot' snakes." Hope bought two snakes on August 3, paying $3 for the two. On August 4 he returned the snakes and received $1.50 for the two. Hope told the snake

man the Humane Society had stopped the fight. This last sentence was stricken out on suggestion by the court. The sentence stricken out gives rise to the same suggestions or hints which several times appear in the evidence as to whether snakes were on occasion pitted against dogs, or other animals or game cocks in wagering contests.

Hope told James that after making inquiries all over the country he had gotten two snakes from Pasadena. One was in a glass box and the other was in a small box that had a screen door on top. He was driving James' car. He put them in the automobile and took them to Los Angeles and telephoned to James that he had the snakes. James met him in front of his shop and told him to drive around the block. James finally came out and got into the car and drove out Vermont avenue to Slauson avenue. Hope said his wife was then at his apartment. James drove the car on all occasions when Hope accompanied him, except the first. James asked Hope where he was going and he said, [fol. 2650] home. Hope's car was at Beverly and Vermont avenues. En route he and James stopped at a drug store and James gave him a prescription and handed him $5 to have it filled and to buy "two inches of adhesive tape". He asked the druggist what the prescription was for but the druggist refused to tell him. He took the adhesive tape and the filled prescription and gave them to James. In answer to the question as what next happened, Hope, after starting an answer, called for a drink of water and the court took a recess. What the prescription contained, if the circumstance actually happened, is not disclosed. It may be suspected from several suggestive circumstances which will later be related, that it was to be used in an attempt to bring about an abortion. Hope later admitted that he had been connected with a drug company in some capacity. Upon reconvening Hope resumed his testimony. He said that after he had procured the prescription and they were on their way James told him "his wife had $5,000 worth of insurance and he was going to collect it". James said no more on the subject so far as Hope could recollect than the above quoted words. Neither did James say anything, so far as the memory of the witness went, about Hope taking any part in collecting the insurance. At Beverly and Vermont avenues Hope got into his car and went to his wife's apartment and took her to dinner and later to a show. The witness was then asked when he next

saw Mr. James and his answer was, "I went after my wife by 10 o'clock in the morning." He then drove with his wife to La Canada and instructed her to wait on the corner. He arrived at the James residence about 12:30 or 1 o'clock, and James came out. Hope said James had been drinking a little bit. He told him he had come for the snakes and James said he could not have them right then. He had a couple or three drinks with James in the garage. The snakes were in boxes in the garage and alongside of the boxes there were three or four dead chickens. He went back to where his wife had parked and told her he couldn't get the snakes then and she apparently drove off and he went back to the garage and was there ten minutes when James came in and bluntly said: "You are in this thing as deep as I am. You have bought these snakes all over the county. I have had you visit here at the house. Different people have seen you." He further said, "Now, bring that box in the house". Hope walked ahead of James carrying the glass-top box with the snake in it. James passed Hope entering the house. He thus described the situation: "Mrs. James was lying on the breakfast table with a piece of adhesive tape over her eyes and over her mouth. He went ahead of me, raised her foot up so I could get by, and pointed to where I was to set the box, on the seat of the breakfast table. * * * In setting that down the top flew back. He put her foot in the box. The snake was in the box and was alive. After he closed the box I took it back to the garage." As he entered the room he noticed Mrs. James move on the table. She was in a night-gown, her legs were bare. It was the left leg that was placed in the box. Hope said the time required for the entire operation was not more than three minutes. He immediately returned to the garage and after remaining there 15 or 20 minutes James brought him a water glass full of whiskey. He had some drinks with James. James asked him why he was so nervous and said: "She is all right. Drink this, it will steady your nerve." Hope replied that he wanted the key to his car; he wanted to get away. James brought him the key to his car. Hope put the dead chickens and the box with the [fol. 2651] snakes and a gunny sack in the car. Hope drove to his wife's apartment in Los Angeles but she was visiting friends. He drove to where she was and she and her friends got in the car (apparently Hope's car), and he followed her driving James' car to their apartment and Mrs. Hope then

got in the James' car. "Q. And then where did you *three* go? A. We drove toward Pasadena, stopped on the way, and she had dinner, drank some beer. We went over to this place (Snake Joe's) where I had purchased the snakes and returned the two snakes to this man." After leaving Snake Joe's the witness said he did not know where they did go. They started for the beach. On La Cienega, within a mile or two of Venice boulevard, he threw out one of the boxes containing a snake. The second box was thrown out along the roadway on Venice boulevard. He and his wife and the third party, if there was another party, called on friends and Hope went along to James' residence, reaching there about 1:30 a.m. He went to return him his car. He put the car in the garage and James came out. James had been drinking. He wanted to know of Hope what he had done with the snakes and where he had been. Hope got in the car and the two sat down. James put the bottle of whiskey on the seat and the two had a couple of drinks. He (James) cooled down a bit and said: "Those snakes are no good either. My wife is not even sick." Hope said, "Why didn't you take her to the *hospital?*" James said: "No, they will strike us both higher than a kite." Why Hope should have suggested taking Mrs. James to a hospital in frustration of the plot to kill her passes human understanding.

It appears from the foregoing colloquium, so far as it can be rationalized, that Mrs. James was in dire need of medical assistance for a condition brought about by an attempt to commit an abortion, and obviously not for a condition brought about by an attempt to take her life. The necessity for urgent medical aid and James' reply to Hope as to what would happen to them if the cause of Mrs. James' condition was revealed to medical skill, gives more than mere color, considered with other evidence which crops out a number of times in the case, to the theory that Mrs. James submitted to an attempt on the part of Hope and James to perform an unlawful operation in which death ensued and in their dilemma to avoid responsibility they carried her to the pond to give the appearance of death caused by drowning. That the autopsy physician had no thought of an attempted abortion and made no examination to determine abortion as a cause of death and made only a casual observation of the uterus from the abdominal incision, is patent from his direct examination. Some two or three

weeks later and after considerable evidence had been introduced tending to support the abortion theory the doctor was recalled in rebuttal and testified that he examined the uterus including the vaginal region. Asked if he found any evidence of an abortion having been committed he said he did not. He observed a fetus indicating a pregnancy of about six weeks. Asked on cross-examination if the presence of the fetus was not absolutely conclusive that an abortion had been committed his answer was "Yes, sir". There is obviously some error in the transcript or misunderstanding on the part of the witness as to the question. The presence of the fetus would only indicate that it had not been expelled or removed from the uterus but that fact alone would not prove that an abortion had or had not been committed or attempted. An attempt to commit an abortion frequently results in death. No examination was made [fol. 2652] as to the condition of the fetus inasmuch as the theory of drowning was accepted as final. There is no evidence to show that the interior of the uterus was examined. In fact there is no evidence to show that more than a casual or general observation was made. The doctor testified that an abortion may be committed by administering drugs, or by violent exercise, which would include manipulation of the body, and if an operation was attempted in any other way than by the use of instruments there would be no way of ascertaining that an attempt had been made.

After James had predicted what would happen if they had taken Mrs. James to a hospital, Hope said James "jumped up and said, 'I am going to drown her'." James then went in the house and Hope said he stayed in the car and at about 4 o'clock, after some two or three hours had passed, James came to the car and said, "That is that". He presently said to Hope, "Stay here a little bit and I will take you into town". At about 6:30 or 7 o'clock a.m. James came out of the house to the garage and said, "She has been dead since 4 o'clock. The house is all cleaned up and you will have to go in and help me carry it out". Hope entered the house and saw Mrs. James' dead body on the floor of the hallway. Her head pointed toward the front door and her feet toward the bathroom. James took hold of the upper part of the body and Hope took hold of the lower portion and James went through the door that led to the sidewalk. He said to Hope, "You will have to put her in the fish

pond", and Hope said, "I won't do it." He went back to the car and after four or five minutes James returned to the garage and handed him a bucket full of soiled clothes among which were a couple of Turkish towels. He saw a couple of pieces of rope, a red sweater and some tape. Three blankets were also put in the rear of the car. They started for Los Angeles. James said to him not to get excited or nervous, that he would take care of him when he got the money. He and James drove to Virgil and Bryne streets where James got out. He handed Hope $30 and said that he would have to dispose of the stuff and get out of town. Hope put the bucket and blankets in his car and went to get his wife and found her eating breakfast. He took her to work and came back and put the stuff in the sack with the dead chickens and put it in the car. He then went for a drive, but didn't know where he was going. He left the blankets in his house and they were sent to the laundry with other soiled linen. All other articles he disposed of in an incinerator back of a drug store on South Vermont." He said he could not remember all the materials that were burned but he named a red sweater, and a couple of Turkish towels. There were other things but he did not know what they were. Hope was shown a piece of ordinary cotton clothesline rope and said it resembled pieces of rope he burned in the incinerator. One of the investigators in searching an old trunk that belonged to James and which had been stored or left in the garage or outhouse where his niece resided for quite a long while, testified that he found in the trunk cotton rope of the same type. Hope, upon being asked a second time how Mrs. James was dressed when her foot was placed into the box containing the snake, materially contradicted his former testimony, by saying that she was dressed in pajamas and house shoes. On cross-examination his answer to the question "How much of the foot was placed in the box", was "I don't know—the foot was immediately pulled out very fast". He thought James' hand clasped the calf of her leg. He withdrew the leg practically instantly. The foot was slightly above the [fol. 2653] snake's head.

Hope said he asked James how he was able to get Mrs. James on the table in the position she was and he said he told her that a doctor was coming out to perform an operation on her for pregnancy. This and other evidence strongly indicates that Mrs. James was seriously contemplating re-

lieving her pregnancy by artificial means. He told Snake Joe that the snakes were to fight chickens and dogs. That, he said, was what James instructed him to say.

After Monday, August 5th, this being the day Mrs. James was found lying in the pond, Hope says he did not see James for several weeks thereafter. He first saw him in the barbershop quite a while after August 5th. He was asked if he had a conversation with him. His answer was, "Oh, just the general topics of the day at that time. Yes; nothing was said about this."

A month after Mrs. James' death he saw James again at the barbershop and they conversed on the subject of the killing. He told Hope, so he testified, that he, James, would give him $1,000, "if *we* testified that *we* saw Mr. and Mrs. James married". By we presumably he referred to Hope's wife. Hope said his answer was "No, I wouldn't do it." He saw James at a later period at his barbershop, the time he was unable to state, but it was some time after August 5th, as he dropped in the shop to get his hair cut. As James was finishing cutting his hair he slipped $100 in his hand which was covered by the barber's apron. The shop was full of people. He said, "Don't remember anything about me, and I advise you to get out of town." Asked if he said anything else the witness continued, "He said, 'Don't try to give it [the money] back to me; somebody will see you, and you will get us all in bad'."

A blue blanket, a pink blanket and a tan blanket which the witness testified were given to him by James and which he took together with soiled clothing from the James home on August 5th, were identified by Hope. R. H. Kirby, Mike Allman and Joe Houtenbrink, commonly known as Snake Joe, all dealers in and exhibitors of snakes and reptiles were called upon singly to stand and were identified by Hope. On cross-examination the witness admitted that he had read much of the testimony he had given before the grand jury and he had read his wife's testimony.

Continuing his testimony he said he kept the three Long Beach snakes in his apartment for two days and when James gave him the money for them he delivered them to his La Canada home. There appears to be some discrepancy as to the length of time he had them at his apartment. Evidently he had them for several days on his own statements. After delivering the three snakes he did not see James until two weeks thereafter, at the barbershop. The witness then

said that he delivered the snakes at James' garage "around the 5th or 6th of July". He said he was getting ready to move and he had to get the snakes out of his apartments. He was out of work and he moved to the James home to do some work about the place. Hope rather decried the suggestion that he was doing work of any great consequence or that he was on the place at the hours Mrs. James was there, during the day time. He admitted that he fixed a chicken coop, tightened a little wire and "raked around a clothesline". The other days he was there he said he came into town with James or with James and James' sister. He stayed at the home four or five days and Mrs. James was there two days of that period. She left to attend a dental convention in session at Long Beach and Hope left [fol. 2654] the day following her departure. He was at home on the day the landlord was removing hardwood to another place. Mrs. James was at Long Beach on that day. James' sister, Mrs. Eva Murphy, chief evening operator of the telephone company at Morris, Alabama, was visiting James and his wife during the time Hope was temporarily stopping at the James home. Lois Wright, James' niece was at the home on occasions. He saw and talked with James' sister several times while he was stopping at the James home. The landlord was also there moving flooring from the premises. Hope indicated that he took only his breakfasts at the James home but lodged there nightly, getting in late. On cross-examination he testified for the first time that James paid him $100 the night he delivered to him the Ocean Park snake. This amount is in addition to the $100 which he says James slipped into his hand under the barber's apron or cover while shaving him. On cross-examination Hope testified that he saw the snake strike the deceased in the lower region of the foot. The snake was coiled. Its head traveled but three or four inches. He heard no rattle. Mrs. James was dressed in a nightgown. Hope denied that he ever pretended to have any knowledge of medicine but said that James told Mrs. Murphy, James' sister, in his presence, that Hope did possess medical skill and he, Hope, made no denial of the representation. Continuing his answer he said: "And neither did I deny the name that he introduced me by when his niece was right there and knew my right name." This reference was to an occasion when he was introduced as "doctor".

Hope admitted that he had talked many times with seven or eight of the investigators, naming officers J. C. Southard and Scott Littleton, and others who were preparing the case and he had been taken by them to places associated with the offense charged and had eaten meals outside the county jail, and had also talked with the district attorney and the deputies in charge of the prosecution but denied that he had discussed what he proposed to testify to with anyone.

When Hope went to Kirby's to buy the first lot of snakes he told Kirby that the snakes were to be used for experimental and scientific purposes. As an aid to Hope in his scientific research Kirby gave him a small jar containing crystallized or dried, rattlesnake venom. Crystallized or dried venom is as poisonous as the fresh venom. Hope took the jar of crystals and put it in his suitcase and had forgotten about it, but when he moved to James' place it came to his mind in some way and he offered it to James and James said he "didn't want it", and rejected it. Asked what he did with it his reply was, "I don't remember what became of it. I may still have it; I don't know". At another time in his examination he said he gave it to James. This testimony further intensified the mystery in which the whole theme of the plot to produce death by resorting to the means of rattlesnake poisoning was enveloped. Hope said that the last time he saw Mrs. James alive was in the afternoon next preceding her death. He did not then speak to her and not a word was spoken in the house by anyone. He had been informed that she was pregnant. Not a word further in explanation of the circumstances in which he had seen her or the condition she appeared to be in or the particular place where he saw her on the afternoon preceding her death, was related by the witness. He testified that he did not know whether venom in crystallized form was or was not poisonous.

It was quite impossible to have Hope give a definite answer as to what James' condition as to sobriety was on the early morning of August 5 when he arrived or during [fol. 2655] the time he was at the house. He first said he concluded he had been drinking from the fact that he smelled the odor of liquor on his breath. He also said he and James took two or three drinks, not large ones, but he did not see James take any more.

From his statements as to what occurred at the James' home from 1 a. m. Monday, August 5, to 6:30 or 7 a. m. of that day, it may be inferred from some of the things he related that James appeared to have been affected by intoxicating liquor, and on the other hand he seems to intimate that he was not so affected. His testimony in this as well as in other respects is equivocal, as shown by the following excerpt:

"Q. Well when you saw him at 1:30 [this is when he first arrived at the James home on the day he helped carry her dead body to the pond] he appeared to be intoxicated to you, didn't he? A. I stated I didn't know whether he was mad [because of Hope's delay in arriving] or intoxicated. Q. And after he took the drinks with you, between 1:30 and 2 o'clock [a. m.] he appeared to be intoxicated, and not mad, at you, didn't he? A. Well, I wouldn't state that he was not intoxicated, or mad either. He didn't seem to be so mad then. Q. But he did seem to be more intoxicated, didn't he? A. Slightly, yes. Q. Did he appear to have been drinking when you saw him in the morning about 7 o'clock? [Objection to question overruled.] A. Well, I was so scared in the morning I don't know whether he was drunk, or not."

He said James seemed extremely nervous, but his speech "never was incoherent". Prior to this he said his speech was "very much shot". He didn't stagger while he was assisting him in carrying the body to the pond. James shortly thereafter drove him in the automobile to Los Angeles. The witness did not see James take a drink from the hour of 2 o'clock during the rest of the morning. They left at 7 o'clock. Hope says he was alone in James' automobile in the garage for some five hours or more, and gives no reasonable explanation for his long stay. He slept a part of the time surrounded by the horror of the scene from which he had both the means and opportunity of withdrawing.

Hope had done no work during the month of July except the few days he was engaged at the James' home. While doing this work he saw quite a few black widow spiders in the garage and in the hen-house and wash-house. (Black widow spiders as a secondary element in the case will later appear.) He said that during all the times that he had known James nothing had been said about killing his wife until the rattlesnake proposition was suggested by James

a short time before her death. His sworn words are that he had no knowledge as to how Mrs. James met her death except from what James told him. In short, he plead guilty to a charge of first degree murder which carried with it the possibility of the imposition of the death penalty, a crime which he did not commit, or assist in committing. No reasonable contention can be made on the evidence in the case that Mrs. James died from being bitten by a rattlesnake. Hope testified on the trial of the case that he took no part in drowning her, and did not know except from James' ex parte statement that she had been drowned.

The foregoing summary substantially contains all of the testimony given by Hope, who occupies the irreconcilable inconsistent position, in which he has placed himself, firstly, of being at one and the same time an accomplice to the murder of Mrs. James and secondly, not guilty of the crime. Drowning is the only way death could have been criminally [fol. 2656] accomplished if his testimony is to be taken as sufficiently convincing to establish the fact for which it was offered. It is not seriously contended that the deceased died from rattlesnake venom, and the abortion theory is most vigorously combatted by the people. Hope's testimony is, in several instances, confusing as to the sequence and order in which certain acts were performed, notably as to whether certain acts were done on Sunday, August 4th, or Monday, August 5th, and lacks, in some instances, definiteness as to time.

Mrs. Edna Hope, wife of Hope, followed him as a witness. She testified that Hope called for her at the place she was working at 1:30 or 2 o'clock, August 3, 1935. Neither the place nor the nature of her employment is stated. He was driving James' car. They stopped at a lunch place and had lunch and resuming their journey, Hope finally stopped in front of a snake farm. Mrs. Hope stayed in the car. Hope took a box and went to the side of a barn. He and Snake Joe finally came to the car carrying a box which Hope put in the car. Hope then drove to Los Angeles and let her out. He telephoned, inferentially to James, and left. She saw him again at 7 o'clock or 7:30. He was, at this time, driving the Hope car. They had dinner and went to a show. She saw Hope the following morning at 9:30 or 10 o'clock, and they had breakfast together. They drove to La Canada in their car and parked the car a block from the James home. He told her to wait as he would be back

in half an hour. He came back to the car in fifteen or twenty minutes. They talked a few minutes and she drove to Los Angeles. She saw him again about 2 o'clock. He drove up to where she was visiting friends, in James' car, and honked and she came out. She followed him several blocks to the place where they lived and she then got into the James car and they drove to Pasadena where they had been the day before. She noticed some boxes in the back of the car. There was a bad odor about the car. Hope took a sack out of the James car and put it in the Hope car. She then parked her car and they drove to Pasadena and Hope got out at Snake Joe's and took a box inside and was there several minutes. He and Snake Joe came out and went to the corner and she turned and went down to the boulevard, honking the horn. Hope came out and they drove away. At La Cienega boulevard Hope threw out a box which landed in the weeds. No explanation or reason is given as to why he should throw two of his snakes into the highway. He had theretofore resold or exchanged other snakes to the dealers. At Venice, Hope threw out another box on Venice avenue, which had a glass top. They drove back to Los Angeles and had something to eat. Hope had an engagement to play cards. She said she went "over there with him", not designating the place. He took her home and left her. This was Sunday, August 4th. She did not see him again until about 8 o'clock the following morning as she was getting breakfast. She described him as appearing "white and jittery, and had been drinking". Hope took her to work and about noon he came after her and took her to their apartment. She saw a blanket wrapped around a bundle in the middle of the floor. There was also another blanket. She sent one of the blankets to the laundry with a bundle of their laundry. When she got back to the office Hope got out of the car and said he "had things to burn". She saw him place a bundle in the incinerator back of the "place". It appeared to be a gunny sack. She identified three blankets, including the laundered blanket which Hope [fol. 2657] had brought to the apartment. She told the story as above set forth to the district attorney's office before Hope was indicted. She wanted to help him all she could.

The above is a full resume of Edna Hope's testimony made as definite as to circumstances as it is possible to do. There is nothing in it to show that her curiosity was aroused as to Hope's mysterious trips to Snake Joe's pit, or to the

James home, or as to what was contained in the boxes or sack which he transferred from one car to the other, or as to the throwing out of the two boxes onto the highways, one of which had a glass top, or as to what caused the bad odor which she detected, or as to what the articles were which Hope burned in the incinerator. What significance the Turkish towels, blankets and other destroyed articles may have borne to the theory of death by drowning, or even to the rattlesnake theory is certainly not perceptible. It is readily perceptible that the burned articles would have been more likely to have afforded incriminating evidence of death caused by an attempted abortion, if death so resulted, than they possibly could have served as proof of death by drowning. Hope himself said the bed sheet was bloody, attributing to the slight cut on the toe.

Hope testified that Mrs. James was on her back with nothing on but a nightgown, raised above her knees, and her knees were projected slightly beyond the edge of the table. He was unable to definitely describe the method by which she was tied down other than to say the rope passed over her shoulders or chest. Her lower extremity was not fastened in any way to the table. Pieces of adhesive tape were stuck or posted over her eyes and her mouth. It is not understandable why a person preparing another for drowning would lash his intended victim to a table. But the theory of the prosecution is that he was preparing her to be bitten on the foot or ankle by a rattlesnake. Hope said her foot was thrust into the box very swiftly and did not go deeply into the box. In fact he testified that James held her limb not far from the ankle or calf of the leg as the limb momentarily entered the box. There is no accounting for the gown which Mrs. James wore while she was on the table or as to whether it bore any evidence of an illegal operation. Hope testified to intensive cleaning up which he said James did following the rattlesnake episode and the sudden change of plan from death by rattlesnake venom to death by drowning. Why there should have been any occasion for extensive "cleaning up" or for the laundering of articles of household or personal use and the burning of others has not been explained, and there is no apparent rational theory upon which these activities can be reconciled with either of the two theories advanced by the state. He testified further that the body was dry and there was no water on the floor, and the articles which were carried away were also dry

when he entered the room. The foregoing is substantially all of the testimony that may be said to bear directly on the corpus delicti, except the testimony of the defendant, the only other possible witness to the act, which will later receive attention. The balance of the evidence is of an indirect character and consists of various circumstances, to-wit: the alleged confession, alleged statements made by the defendant and certain acts which the prosecution claim tends to establish the crime and connect the defendant with it, including the issue of motive.

It may here be said that it is not to be taken as any inclination on the part of the author of this dissent to vindi- [fol. 2658] cate or minimize any of the acts or conduct of the defendant which reveal moral depravity or perverse tendencies by anything said in the analysis of the evidence, but it is our purpose and our bounden duty, in all cases, under the mandate of the law, to dispassionately and carefully examine the evidence presented on appeal, as to its sufficiency and consistency, and give effect to the cardinal rules of criminal procedure which are the palladium on the preservation of which depend those guarantees of protection to life and liberty which the state vouchsafes to every person charged with a criminal offense without regard to the heinousness of the offense charged or the station of the person against whom the law's severest penalty may be invoked.

It may further be stated as an axiom of law that a conviction may not be had on the weakness of the accused's defense but it must rest solely on the strength of the case made against him. Mere conjecture, or suspicions, however strong, are not sufficient to warrant a verdict of guilty. Nor can the doctrine of chances, which is to say, that the chances are greater that the accused is guilty than are the chances that he is innocent, be permitted to usurp the office of substantial proof which must satisfy and convince the understanding to a moral certainty. If the evidence convinces the minds of the jurors that the person on trial is criminally responsible for a homicide, and a doubt exists as to the degree of punishment which should be imposed, their verdict must be in the lesser degree.

While it is not a circumstance, strictly speaking, which can affect the legal aspect of the case, it is nevertheless noteworthy that the jury was nine hours in deliberation—from

10:56 a. m. until 8:10 p. m.—before the verdict imposing the death penalty was consented to.

The defense base their arguments for a reversal on a number of grounds, the major ones being the inherent improbability and unreasonableness of Hope's absurd story, which, they claim, was fabricated by Hope under the tutelage of a large number of over-wrought investigators in charge of the prosecution. The defense's contention directed at Hope's testimony, is that before the testimony of a witness may be accepted as sufficient to sustain a judgment it must accord in the main at least with the normal conduct of persons responsible to society for those acts which are prompted by avarice, revenge, passions, and emotions which influence the average normal persons in doing deeds, good or bad. In those cases where the acts mark such a wide departure from the natural as to partake of the nature of the weird, extremely gruesome and inexplicably uncanny, and to stifle the application of the common rules of reason or logic, proof of the specific acts charged should be established by very substantial and convincing proof. The claim is made that out of the multitude of detached erotic and sordid acts put in evidence against the defendant, many of them must fail because they were not established by the convincing force which the law and reason require in such cases and that many of the misdeeds charged were not relevant or material to the crime alleged in the indictment and obviously the only effect which such acts could have had was to turn the minds of the jury against the defendant so thoroughly that his defense and all that was offered in his behalf would be discredited by the jury and the presumptions of innocence and the doctrine of moral certainty would be swept aside by a flood of prejudice-begetting accusations against which the defendant, under [fol. 2659] the law, was entitled to be protected. In this connection, it may be stated, that three incest offenses charged against the defendant as having been committed with one Lois Wright were investigated and carried along with the murder charge, which crime was alleged to have been committed some eight months prior to the investigation of the incest charges. The investigations were so connected that the officers in testifying as to the arrest of the defendant and alleged conversations had with him bearing on the murder charge, would and did bring to the jury's attention the fact that the defendant was also charged with,

if not then convicted, of the crime of incest. The incest charges were wholly separate from the murder charge and they should not have been injected into the murder case, especially by an officer of long experience, when testifying in the case. He too readily volunteered improper statements, and intentionally made reference to matters which were not responsive to any question propounded. It appears that the dictaphone installed in a house rented by the officers and adjoining the James residence and under the personal supervision of Officer Earl E. Kynette was the original plan adopted for the discovery of evidence to be used in the prosecution of the incest charges.

Among the several objections most strongly urged by the defense is one directed to the exhibition of live rattlesnakes. Others of like character are made to the exhibition of a dead snake enclosed in a glass jar, with open mouth and fangs projected from the upper jaw; Rattlesnake venom in crystal form, and fangs in the primary, secondary and third growths, and the manner in which they are attached to the upper jaw, and the method in which the virus is expelled through the fangs were exhibited and explained to the jury in much detail. The ways and habits, kinds and species, longevity in captivity, the manner in which they obtain their food, how and why they coil and strike, and the physical structure of reptiles of the crotalidae family and the excruciating pain the victim suffers as the subtle poison stealthily creeps through the circulatory system were meticulously discussed by naturalists, zoologists, entomologists and herpetologists, who had earned their degrees at venerable American and European universities. Three or four lay experts who had gained their knowledge of reptile habits from practical experience on the desert and in habitats where snakes are most abundant, added hundreds of pages to the record which could not have assisted the jury in the remotest degree in their consideration of the case.

Besides the snakes and their products which were put in evidence, photographs of the deceased, after the body had been exhumed, were also resorted to and a human skull was used to illustrate the manner in which the injuries may have been inflicted upon the head of Winona James in the Pike's Peak automobile wreck.

There is no doubt that photographs and exhibits are admissible for purposes of identification and by way of illustration when material and germane to the issues involved

but when they are not necessary or, from the nature of the subject under investigation, could not enlighten the jury as to the main facts in issue and are of such character as would tend to harrow the feelings or excite passion or prejudice in the minds of the triers of fact, they should not be received in evidence or exhibited to the jury.

The defense, naturally, protested against bringing into the courtroom a glass-top box containing two live rattle- [fol. 2660] snakes, and its exhibition to the men and women who composed the jury. Joe Houtenbrink, commonly referred to as Snake Joe, who operated a snake farm in West Valley boulevard, East Pasadena, was on the stand when the snakes were brought into the courtroom. The witness had testified that he first met Hope on August 3, 1935, at his place, No. 42 Cypress street, Pasadena. He sold him two snakes belonging to the diamond-back or Crotalidae Atrox family, for $3.00. He repeated Hope's story of a bet he had made with a man who wanted to kill a dog, and if the snake would kill a dog he could win and therefore he wanted real hot snakes. He had a box, one side of which was glass, into which the snakes were placed. On the next day, August 4th, he repurchased the snakes from Hope. Hope said the Humane Society stopped him from having the fight. Snake Joe gave him $1.50 for the two snakes. The witness was asked if he still had the same snakes in his possession and upon answering that he had, two men entered the crowded courtroom carrying a box containing two snakes (but one snake was in the box into which Hope said Mrs. James' foot was forced), which they deposited beside the bench. The following proceedings ensued: Mr. Clark, counsel for defendant, objected to the witness leaving the stand to inspect the box and making exhibition of any snakes to the jury. Counsel, in open court, requested the court by order or appropriate means to make or cause to be made a record "that two men have just entered the courtroom carrying a box covered with a burlap cloth, and upon their coming down the aisle, the people who were in the courtroom, filling the courtroom, manifested excitement; that several of them arose from their seats; that the attention of spectators and the jury was directed away from the testimony of the witness; that at the time I am speaking there is upon the faces of the audience an appearance of anxiety and consternation not heretofore exhibited during this trial." (Uncontroverted affidavits aver that the snakes

were sounding their rattles as they were carried down the aisle.) The court thereupon made the following statement: "The court has no knowledge that there was any such manifestation on the part of the audience. The court is unable to state whether the attention of any person was diverted or not, nor is there anything to indicate the apprehension that your statement implies; at least it has not been seen by me. Mr. Clark: In other words your Honor has no knowledge that the statement I have just made is correct. The Court: No. That may be your frank, honest opinion as to the facts, however, the Court has not seen any such situation. Mr. Clark: I will try to find appropriate means of putting those facts in evidence. I think they are facts and that my statement is appropriately made at this time. The Court: So far as the facts of the two men having taken the box in from the courtroom door and passed up the aisle between two groups of spectators, through the gate into the inner part of the courtroom and deposited the box by the side of the bench, the record may show that did occur."

Affidavits made by the attorneys for the defendant and which were not specifically traversed, were presented on motion for a new trial, containing averments describing the consternation, commotion and waves of terror which spread throughout the courtroom as the snakes were carried down the aisle, sounding their rattles, in the glass-faced box.

The snakes were received in evidence and exhibited to the jury against the objections of the defendant. Motions to strike on numerous statutory grounds were denied.

[fol. 2661] The witness said he never saw James before he saw him in court. In describing Hope's condition at the time he returned the snakes, he said, "He [Hope] had had a couple of drinks, is the way it looks, but he wasn't intoxicated. We had some drinks ourselves, I remember; went out and had a glass of beer together."

Roland H. Kirby, the Long Beach showman and exhibitor of reptiles of whom Hope purchased his first lot of snakes and from whom he received the jar of crystallized venom, in qualifying as an expert testified that he had had eleven years in research and experimentation work with reptiles and had lectured to classes in zoology and had attended experiments at different institutes in regard to the effects of snake poison. His knowledge was gained by reading and from practical experience. He said he had been bitten by a rattlesnake and spoke of the great suffering he endured

and described the effect the venom had on him personally. In his experience three out of ten persons who were bitten, died. He exhibited several rattlesnake fangs by way of illustrating his testimony. Counsel for the prosecution cautioned that the fangs were potentially dangerous even when detached from the head, and advice was given that they be carefully handled. He recalled Hope buying the three snakes. Hope at no time gave any reason why he bought three snakes instead of one. So far as his testimony goes only one was actually used. At no time did James tell him to get any definite number and he seemed to have used his own judgment in procuring snakes for whatever purpose they were to be used.

Mike Allman is the proprietor of a "reptile exhibit" situated at Ocean Park. The reptiles are confined in a pit 30 by 40 feet in which there were from 150 to 200 reptiles on the day James and Hope entered. He performs in the pit with the snakes and the audience views the snakes from the rim. An iron railing extends about the rim of the pit as a protection to the visitors. His memory was somewhat hazy as to when or how they came in but it seemed to him that they had had a couple of drinks and they got noisy, he said, "as people frequently do in this place," and he became annoyed. They insisted that he did not have a poisonous snake in his pit; that he had removed their fangs. He did not pay much attention to them as he was talking to other people. Finally James made an offer to bet him he didn't have a poisonous snake. He got sore and was going to bet him but he bluffed out. He didn't notice them any more and didn't see them when they left. His observation of them was certainly very fleeting. The next day Hope came back with a glass covered box in which he had a half grown white rabbit and he said James had bet him $50 that he did not have a poisonous snake on the place; that he had lost to James $100 playing poker and he wanted Allman to guarantee that the snake was poisonous and he would have a chance to win back one-half of what he had lost. Hope wanted him to "put the rabbit in the box and kill it, to show that it was poisonous." Allman refused to do this and said he could take the rabbit any place he wished and test it out. Hope gave him $3 for the snake. The witness admitted that he had attended the trial and had heard Hope's testimony. The next time after the purchase that he saw James and Hope was in May, 1936, nine months after

said purchase. James and Hope were taken by a number of the investigators for the district attorney's office who had been active in the case and other officers to Allman's place [fol. 2662] for identification Allman had not seen James, if ever before, since July, 1 35. He had no previous acquaintance with him. Allman admitted on cross-examination that the following questions were asked him, and the following answers were given by him when he appeared before the Grand Jury during the investigation of the murder charge. His answers were as follows: "Q. And did they have any conversation with you? [After entry into the exhibit.] A. Yes, sir; I was playing with the rattlesnakes, as I generally will do, making them strike, and working around pretty close to them, and they got an idea the way a lot of people figure those snakes are harmless, but we don't remove any fangs * * * Well, one guy, Mr. Hope—he was the one that was a little bit—wanted to argue about it. He says, 'Those snakes are not poisonous.' I said, 'Certainly they are poisonous.' 'Well,' he says, 'do you want to bet $20.00 on it.' Something like that. I said 'sure', I will cover the bet.' Didn't you so testify before the Grand Jury, Mr. Allman? A. Yes, I did."

The witness acknowledged a later conversation which took place between him and James at Allman's in the presence of a number of officers at which time the following questions were asked and the following answers were given by him. "Q. And it is a fact, is it not, that you said to these parties [officers] that you could identify Mr. Hope, but you wasn't sure of James? A. Yes, sir. Q. You say you didn't say that? A. I did."

On direct, the witness said he pointed out James and Hope as the men who had been at the snake-pit. On recross, he said that when he identified them the officers had Hope and James in custody and they were separate and apart from the other people. He didn't then know James was in custody. The witness veered quite a bit through several questions and finally said that when he saw the group together he recognized James as a person who had been in his place but he did not know his name. He said he remembered James on account of making the argument as to non-poisonous snakes. He had previously testified before the Grand Jury, and his memory was fresher then as to the events than at the trial, that he remembered Hope because

of the poisonous snake argument he made. As a matter of evidence it was Hope who at the times he purchased snakes of the two other vendors stressed the fact that he wanted to be certain that his purchases were of the poisonous type and in one case used substantially the same language and methods as were used in effecting the Allman purchase. Asked if James did not request him to be careful as to his identification as it meant much to him, his answer was he did not recollect but he "guessed" James did request him to be sure of his identification. Asked if he did not say, "I think I saw you before, but I am not sure," he answered, "No, I don't think I said that. Q. Well, you did say something about thinking you had seen him before didn't you? A. No, I didn't say that either. Q. And yet you haven't the slightest recollection of what you did say? A. Not exactly, no."

Asked how James was dressed he said he thought he had on a dark suit but he wasn't sure. He didn't pay attention to clothes, he watched the face. Asked what the color of James' eyes were he said he paid no attention to his eyes. "You don't when you are in the pit." He was not able to describe the man's features or dress. He did not recollect whether he wore a hat, a cap, or neither.

[fol. 2663] Mrs. Ethel Smith, niece of defendant, testified that she and her husband, Raymond C. Smith, and her husband's father and mother, called at the James home Sunday afternoon at 5 o'clock, August 4th and found the back door locked. The shades were drawn and she could not see into the inner portion of the house. She did not knock or ring the door bell. She wrote the note found in the crack of the front door Monday evening by the Pembertons and James. The party remained fifteen or twenty minutes. Her husband and his father and mother walked about the grounds and picked some oranges and plums. She saw James on the following Wednesday at Viola Lueck's apartment. He said he found her note Monday and asked her if she was there Monday. She told him she was there Sunday. He asked her if she was on her vacation and where she went, and she said she drove up to Mount Wilson, and he said, he did, too, with Mary. He asked her if the officers were there to take names and she said no. James in explanation of the above conversation said that he did not recollect making the statement that he went up Mount

Wilson on Sunday, August 4th, but said that he was up the previous Sunday and the officials searched the car for firearms, and that incident was doubtless in her mind. If Hope's testimony is true, Mrs. James was alive on the Sunday the Pemberton party called at the James home. His testimony was explicit as to when her foot was forced in the box containing the snake, to-wit, Monday morning, August 5th.

On May 8th, Charles Griffen, a member of the investigation staff of the district attorney's office, went to Ethel Smith's house and took from an old discarded trunk belonging to James which was in the garage, and which James had sent to her home months before, a rope, which Hope testified was very similar to the rope used in tying Mrs. James to the table, heretofore described as an ordinary cotton rope commonly used for clothes-line purposes. James had moved from the La Canada home some months prior to this incident.

The only other testimony bearing upon the question as to the time decedent was last seen alive was given by Alfred Dinsley, a neighbor of Mrs. James. He lived at a distance of some four or five hundred feet of the James home but he was not personally acquainted with her. He had an impression of the general stature and appearance of a woman he had seen four or five different times on the James premises. He stored his laboratory apparatus in a shed which he daily visited. On Monday morning, August 5th, at 9:25 o'clock, he was carrying combustible garbage to a common incinerator used by himself and the Jamses, and as he passed near the James premises a pit bull-dog inside the James' gate began barking which attracted the attention of a woman in the chicken house on the James' property who came to the door about twenty-five feet distant from him, and "stared" him full in the face, half smiled and resumed her duty, and he went on his way. He described the woman as being mature, with blonde hair, and some five feet eight or nine inches in height. The witness would not make absolute identification that the woman he saw on the morning of August 5th was the same woman he had seen on the James premises on four or five previous occasions but she was of the same general appearance. He described her as being bareheaded and wearing a rose or rust-colored smock and her "stocking legs were visible to below her knees", and she was apparently wearing shoes. The color

of the garment corresponded to Mrs. James' rose-colored [fol. 2664] pajamas described by her friend, Miss Lueck. The garment was belted at the waist and was not of the pajama or divided skirt type. He could not tell whether the garment was open in the front or the back, or whether it was a pull-over. If Mr. Dinsley is correct as to his date and if the woman he saw in Mrs. James' chicken yard where the dog was evidently barking at him, a stranger, was in fact Mrs. James, and his testimony is very convincing that it was Mrs. James, then of course the story as told by Hope cannot be true. Hope testified that he helped carry Mrs. James out of the house, a corpse, hours before Mr. Dinsley saw the "mature blonde" woman whom he described as having seen on the James premises. Mrs. James was decidedly of the blonde type. The description of the blonde woman he saw in the James' chicken yard, and her apparel, and the fact that the dog near her was barking at him, a stranger, is convincing proof that the woman there described was Mrs. James.

Considerable emphasis was placed on the fact that Hope called at the barbershop at intervals of approximately three weeks and talked with James on terms of friendliness. The evidence is that there was nothing about his visits to cause comment or excite the suspicion of the employees. On one or two occasions he and Hope walked to a cigar store at the corner. The inference drawn from Hope's visits by the prosecution was that Hope and James were conspiring to kill Mrs. James. Their conduct, such as it was, was open and without attempt at concealment, and if Hope's testimony is to be believed, it positively negatives any contention that he ever was conspiring to kill Mrs. James. His acquaintance with Mrs. James had not existed longer than two or three months. His testimony is very definitely to the effect that he was not given a hint nor was any suggestion made by James that he was planning to kill his wife until a very brief time before he was directed by James on the early morning of August 5th to carry the box containing the snakes into the dining room. The vague and inane expression attributed to James weeks before, to the effect that the snakes were to be used as the means of killing the wife of a man who had an extravagent and "troublesome wife" raised no suspicion in his mind that Mrs. James was the contemplated victim. This definitely appears throughout his testimony, except as to one isolated instance, which he

fixes as having occurred Saturday, August 3d. On that day he was returning from Snake Joe's with two rattlesnakes. James joined him later, and on the way to their destination James, then driving, stopped at a drug store and sent him in the store to buy adhesive tape and to have the mystery prescription filled. His curiosity prompted him to inquire of the druggist as to the contents of the prescription, but the druggist refused to give him any information as to the nature of the compound. He made no inquiry of James, as to its use. James, with the rattlesnakes in the car, and prepared with adhesive tape and the mystery prescription, said to Hope that his wife had $5,000 worth of insurance and he was going to collect it. This startling statement seemingly made no impression on Hope. James said nothing more and Hope asked no questions. This exhibition of mental lethargy baffles the understanding.

Lois Wright, James' niece, with whom James had been convicted on three charges, by means of the dictagraph installed by Kynette, of incestuous relations, was called by the prosecution and testified that she was working at James' barbershop beginning April or May, 1935. Her [fol. 2665] best recollection was that she first met Hope at her uncle's home, on a Sunday in July, 1935. Her aunt, Mrs. Murphy, was then at the James home. She had seen Hope at the barbershop on occasions. Sometimes he had barber work done and sometimes he sat in a waiting chair and talked with Mr. James. She had seen them walk out of the shop and around the corner, perhaps twice.

Sam Grant, a barber in the employ of James, called by the prosecution, said that he had seen Hope in the shop getting work done. He was a regular customer. He and James engaged in casual conversation. He had seen them talk in front of the shop on one occasion for a little while. He had seen others also converse with James in front of the shop. Hope was at the shop about every three weeks both before and after Mrs. James' death. No association is shown to have existed between Hope and James as to any unlawful enterprise, save the testimony of Hope, and the alleged confession.

A witness who gave assistance to the bureau of investigation and the police force, and who doubtless had considerable to do with convicting the defendant, was Mrs. Madge Reed who said she was living at an apartment house apart from her husband. While Mrs. James was attending the

dental convention at Long Beach, James at about one o'clock in the afternoon of July 10th, went to the Italian Village for lunch and while there met first a girl friend of Madge Reed who introduced him to her. She did not state the name by which he was introduced. They had something to drink and James became so far affected with liquor that he asked the girl friend to drive him home in his car. He told them he was from Kansas and was on a visit and lived with his sister on Verdugo Road. Whether he gave his true name or a fictitious name is not stated. The girl friend's name, after directions from the court to do so, was given as Merryl Barrows. The witness said she did not know her address or the street on which she lived and she had forgotten her telephone number. She had met her friend only once before at the village. They got into James' auto at about 5 o'clock. The girl friend drove the car to Western avenue and got out and Madge Reed drove to the James home and upon entering the house James said he was going to sleep and went into the bedroom. He gave her one dollar and told her to take the car and get her dinner and when she returned he would be able to drive her into Los Angeles. When she returned from dinner James was still sleeping. In a short time Mrs. James, who had returned home in advance of her return schedule, entered the house. When she came in the door, she "hollered, 'Oh, honey' ", doubtless as a salutation to James. This exclamation of Mrs. James was stricken as hearsay. We think it has significance and should stand. Mrs. Reed was not acquainted with Mrs. James. Mrs. James, after a time, took her to a 'bus connection where she took passage to her home. The witness said she did not see James again until August 11th, five days after Mrs. James' death. Mrs. Reed said James called her up by 'phone on numerous occasions, the first time being the day after she was at the James' home. He apologized for taking her to his home. He didn't think his wife would be home as she was attending a convention at Long Beach and was not expected home for three days. He asked her to go to San Diego with him. He called her up the Saturday before Mrs. James' death, which would be August 3d. He suggested that she get a girl friend and the four would go out together. The name of the fourth party [fol. 2666] was not given by the witness. She did not hear from him again until August 11th, when he called by 'phone

and asked her if she had been reading in the newspapers about his wife's death and she replied she had. He wanted to talk to her about what she had seen in the papers and wanted to go to her apartment, 525 South Coronado avenue, and she told him he "could not," but "he came up anyway." He told her about his wife and "how they were trying to frame him on the case; that as long as his wife was dead that he would collect the insurance and he would marry me and take me north." She left the apartment with him for a ride. He told her that if he was indicted he wanted to spring her as a surprise witness and he would give her $2,000 if she would testify. He wanted her to testify that she had met him and his wife five weeks previous at the Italian Village in the evening; that on the morning of her death she [witness] was out riding and she saw her standing on the porch and "she explained that she was not feeling well and that she had on yellow pajamas and she laid in the hammock and mentioned she had a sore on her leg." At this point it may be pertinent to call attention to the fact that Mrs. James died not later than August 5th. An autopsy was performed on August 6th, and it is not probable that the funeral was held earlier than the second day after death. This would bring the time to August 6th or 7th. The autopsy showed drowning as the cause of death and there was no occasion to anticipate an indictment as the coroner's jury made no accusatory report and so far as the record shows there was no reason to fear criminal proceedings would be instituted and as a matter of fact no charges were made or indictment found until the dictaphone had been installed and a system of espionage had been adopted months afterwards which resulted in the incest and murder charges.

It will be recalled that the first time Dr. Wagner, the county autopsy surgeon, had any intimation that rattlesnakes had played any part in the death of Mrs. James was months afterwards and it was brought to his notice by one of the investigators. No suspicion that she had met her death by criminal agencies was given a thought until months afterwards as evidenced by the time that the body was exhumed for examination some nine months later. It does not seem probable or reasonable that James would have been discussing with Madge Reed the probability of an indictment five days after his wife's death in view of the

autopsy surgeon's record and the slow progress made in developing the case. Continuing her story she said she and James had left her apartment and went to a room in a Hermosa Beach hotel. On the way they stopped a number of times for Mrs. Reed to make telephone calls. They registered (her handwriting) at the hotel. He talked about his troubles and she being a witness for him. He talked about insurance and said it was ' a marvelous thing'' to have and that they were trying to ''frame'' him on that point. She spent the night in the hotel and left the next morning for Los Angeles. On the way back he had her take notes so she would be advised as to what to say when she met James and his wife. She took Mr. Silverman's name (James' attorney) and phone number. The witness produced a card on which she made certain notes in James' presence. She said he gave her $60 to show that he really meant business. She added: ''I was to get $2,000.00 whether I testified or not.'' The written matter on the card was done by her in ink and contained names and addresses. She got the card at the hotel where she said [fol. 2667] she and James stayed the night before. The writing was done while she was en route to Los Angeles. Upon arriving in Los Angeles she took a taxi for her apartment.

She was then passed for cross-examination. She knew nothing as to the whereabouts of her girl friend. Her girl friend brought James to her table at the Italian Village and introduced him to her and they had a few drinks. James said he felt he had had too much to drink and they consented to drive him home. On a Hermosa hotel registration card she wrote, on James' instructions, the names ''Mr. and Mrs. Joseph Wright, San Francisco, California.'' She and James were shown a room by the man at the desk. They walked upstairs to a room but she didn't know what floor it was on. She had no baggage of any kind. They talked most of the night. She did not have any improper relations with James. Before retiring she took off her outer dress, shoes and stockings. She did not remember whether James disrobed or not. When she fell asleep James was sitting up talking. Asked if James went to bed she replied that she did not think it necessary to answer the question, and when instructed by the Court to answer, she answered, ''I don't know.'' She said they were back in Los

Angeles before eight o'clock the next morning. She admitted that she had lived at Wenatchee, Washington, and Salem, Oregon. She denied that she had had "some experiences" at Salem, Oregon. An objection was sustained as to whether she knew a dentist residing at Salem, Oregon. Her friend, Vera Russell was living with her at Los Angeles and paying some of her expenses. She had no idea where she could be found. The witness admitted she had dropped into James' barbershop but said she could not remember the time. She said she had no recollection of seeing Lois Wright at the barbershop. She denied that she asked for and received money. This denial had reference to testimony given by James that she called at his shop the first or second day after July 10th, and claimed that she was out of pocket on account of taxi fare and other charges incurred by reason of driving James to his home, in the sum of $10, which James said he paid to her. She was then asked if she visited James' shop before or after the death of his wife and her answer was, several months afterwards. She visited his shop after he had called her at a time when her mother was dying and she did ask him for money to visit her. To the next question she answered she talked to him on the 'phone. She further testified that inasmuch as she had given him the impression that she would commit perjury for him, and inasmuch as he would pay her whether she testified or not, she thought he "owed her this money." Asked as to whether she did not tell him that unless he gave her some money she would go to the newspapers and attempt to sell her story, her answer was, "I don't recall." She testified that just before the insurance trial in November, James offered her $100 to testify at that trial. Asked when was the last time she called at the barbershop, her answer was, "I don't recall." The only money she claimed to have received from James was the $60 he gave her on the morning following the night they sat up the greater part at a Hermosa Beach hotel.

Mrs. Madge Reed offered not a person in corroboration of her story and none was given save the admission of James as set forth in his testimony recounting meeting her at the Italian Village, situated on 8th street, near Hill, in the same general locality as James' barbershop, No. 522 [fol. 2668] West 8th street. Mrs. Madge Reed's testimony has been set forth as it appears recorded in the case. James

admitted that he met Mrs. Reed one afternoon at the Italian Villiage where he went for lunch. His wife was attending the Long Beach convention. He said he was not feeling good and he drank some cocktails and stayed at the place until five o'clock and was somewhat under the influence of what he had drunk. He met Mrs. Reed, a stranger, and her friend, and after taking the cocktails he asked her if she would drive him home as he did not want to drive the car and she consented to do so. James said he went to sleep on the way. When he woke up at home, which was about midnight, his wife was bathing his face. Mrs. Reed came to his shop a day or two afterwards and said he had promised to give her $10. She said his wife came home while she was there and took her to a 'bus line but she took a taxi which cost her $3 and she had spent other sums and he owed her $10. He gave her $10. James testified that he never stayed all night with her at any time or place; he never saw her again. He denied promising her $2,000 or any other amount if she would testify in his behalf in the event he should be indicted. She called him by 'phone on several occasions and wanted to borrow money. She stated her mother was dying in Australia and she had to have $75 to go to her bedside, and he told her he didn't have it. She then began writing him letters—three in all, and in her last letter she demanded $250. As a threat she wrote him that she had a story for which she could get twice the above amount for publication in the newspapers, but she didn't want the notoriety and preferred to sell it to him. Much of his testimony she either admitted or evaded by saying she did not remember. She said she could not recall whether she threatened him with the sale of her story for publication unless he gave her money.

Several of James' employees who were in close personal contact with him during working hours immediately following the all-night drunken episode related by Hope in which rattlesnakes were tried and discarded as instruments of death, and drowning was substituted as a more effective method, were called by both sides to show the physical and apparent mental condition of James as he appeared at work the day on which Mrs. James died. Without exception, all testified that he arrived at the shop on each occasion at the usual hour, did his work in his customary way, appeared normal and no one detected the odor of liquor on

his breath or observed the slightest evidence of intoxication in any respect. August 3d, the day Hope testified he brought in the second or third lot of snakes as herein related, which was Saturday, James was busy in the shop, and took but thirty minutes for lunch, paid off the help and closed the shop at the usual hour.

This brings us to a consideration of the question of motive which has as its foundation the life insurance policies issued upon the life of Mary James, in which he was the named beneficiary. Motive is an important factor in criminal cases, the degree of strength being relative to the facts and circumstances which make up the particular offense charged. Motive without substantial evidence supporting the incriminatory acts is not sufficient to sustain a conviction. In almost every crime a motive or an advantage to be gained by the perpetrator, patent or discernible, may be shown as an urge for the commission of crime. In the instant case it is contended that the motive was the enrichment of the defendant by the death of his wife.

[fol. 2669] The defendant met Mary Busch, who was a beauty parlor operator, in early March, 1935. He had a beauty parlor stall or parlor, installed in the rear of his barbershop and she was placed in charge on a salary basis. He and Mary soon began keeping company and finally they assumed the relations of husband and wife. James, during this period, had pending in the superior court an action to annul a marriage consummated with another woman. The decree annulling said marriage had not been granted at this time, and he was awaiting the action of the court. He said he and Mary were fond of each other and had agreed to marry as soon as all legal obstacles were removed. The decree of annulment was finally made and they were married at Santa Ana, Orange county, July 19, 1935. Before the legal marriage they had been living together under a mock ceremony. The man who performed it was not a person authorized to solemnize marriages. James testified that inasmuch as he and Mary had agreed upon marriage, in order to give color to a marriage status and keep down talk or gossip, he had the mock ceremony performed. Mary did not know it was a mock ceremony at the time. A valid ceremony having afterwards been performed, there can be no doubt she knew in advance of the valid ceremony that the first was not valid. During the period when they were

living together following the performance of the mock ceremony some of the policies were written on her life. That James was an open advocate of life insurance is proved beyond question by the testimony offered by the prosecution. He talked insurance openly. The several agents who had been his shop customers for long periods of time admitted they had frequently solicited his assistance in discovering and interesting suitable "prospects" for life insurance investments.

The earliest negotiations for insurance on the life of Mary James was had with Louis Berry, agent of the Mutual Life Insurance Company of New York. Mr. Berry testified that he had been soliciting James for insurance since he had become his customer, for about ten years. This was also true as to several other agents. In April, 1935, he told Berry that he would not be personally interested but he knew a girl that would be interested. He declined to give her name until the prospect was ready. The subject was brought up two weeks later in his shop by Berry, and James enquired the cost of a $5,000 policy on a twenty or twenty-five years endowment plan. The result was that James, after being solicited several times, called from the rear of his shop Mary Busch whom he introduced to Mr. Berry. Mr. Berry and Mary Busch left the shop together and talked over the insurance proposition without the presence of James. On May 7, 1935, Mary made application for a $5,000 policy in the Mutual Life Insurance Company of New York. A week before the application was returned James told Berry that the proposition was a little higher than one offered by the Prudential Life Insurance Company. Satisfactory terms were finally agreed on and she took the usual medical examination. The document was sent to New York and the company later asked for additional information which indicated that the issuance of the policy might be doubtful. After a delay of more than a month, however, Berry received and delivered to Mrs. James a $5,000 three-year premium term policy.

James, no doubt prompted by his recent experience as to the necessity of strict compliance with the rules governing insurance applications, on July 29, 1935, ten days after [fol. 2670] marriage, called the agent by telephone and enquired whether the validity of the policy was affected by reason of the application describing Mrs. James as a mar-

ried woman at a time when she was a single woman. In her application she had classified herself as a married woman and named her estate as the beneficiary. James explained the marital predicament in which he and his wife had placed themselves and the agent took the matter up with the main office, and after more delay which provoked some complaint a policy was issued in which James was made the beneficiary. She told the agent she had married since her first application, and the agent wrote in the name of her husband as the beneficiary at her directions. The policy was delivered by Berry to James at the shop on August 5, 1935, after the death of Mrs. James. Berry frequently enquired as to Mrs. James' health and was always told by James she was doing nicely except on one occasion early in July he said she was not well, and inasmuch as she had a health policy she was going to become fully restored to health before returning to work. No claim was made for sick benefits. The first annual premium, amounting to $59, was paid by Mary Busch.

Berry had no conversation with James after his wife's death for quite a few days. James did not return to his shop for several days after her death. He asked the agent several times thereafter if the company was going to pay double indemnity in accordance with the finding of the coroner's jury, that death was caused by accident.

Berry testified that James had done his barber work for a number of years and had given him the names of many insurance prospects. He further said he had talked with Mrs. James with respect to the policy, both in and out of the presence of James.

Max Galatz, representing the Occidental Life Insurance Company of Los Angeles, one of the companies that brought an action in the superior court to cancel its policies, to which James cross-complained, testified as to two applications for policies made by Mary Busch, one a health and accident policy, in the sum of $700, and the other, a life policy in the sum of $5,000, on which policies were issued on her applications in the latter part of May, 1935, before marriage. The agent solicited Mary Busch in the beauty shop and had never been in the barbershop before and was a stranger to both James and Mary Busch at the time he began to interest them in insurance investments. His testimony is confusing in some particulars and discloses much uncertainty as to the substance and the order of events.

He testified that he never had any conversation with James before he obtained the applications and both were obtained on the same day. Four or five days previous to the time of taking the application he met Mary in the beauty shop and had a conversation with her. James was not present. He was next asked: "Q. Was the defendant there at any time when you had a conversation with her [Mary Busch] before you actually got the application. A. No." He said he had a slight conversation with James during the interim from the delivery of the application to the issuance of policy. After the $700 application was completed, James, in the presence of Mary, said, "Will you insure her?" The agent's answer to this question is unintelligible. The thought attempted to be expressed seems to be that he told James it was necessary for him to have insurance in his own right over and above the amount provided in the policy [fol. 2671] in which he was beneficiary. The agent filled out the application form in his own hand in the presence of Mary Busch, and he asked James if he was the husband and Mary if she was the wife and each answered, "Yes." He told James, hoping, he said, to write him a policy in the amount of $5,000, that it would be absolutely necessary for him to have a greater amount of insurance on his life than he was writing for Mrs. James. James told him he had plenty of insurance. After instruction from the head office he went to James' barbershop and wrote a policy on his life in the sum of $3,000. The policies were delivered to James at a restaurant near his shop. The premiums were paid on each policy.

On cross-examination the agent testified that the first time he was in the shop was the time he called on Mrs. James in which he discussed health and accident insurance with her. James testified that the first time he ever saw Galatz was June 2d. He was cutting his hair and Galatz overheard Mrs. James ask Berry when her policy would be issued and Berry said he would be surprised if the company did not turn it down. As soon as Galatz got out of the chair he went into the parlor and began soliciting her for her insurance. This statement finds corroboration in the evidence. Galatz said he never discussed life insurance with Mrs. James. Answering the next question he said he discussed it with James in her presence. He was asked if he ever "discussed the subject of life insurance with Mrs.

James, regardless of who was present," and he answered, "Yes." Following this he said he wrote her policy after talking to her and James; that he procured from her directly all the information attached to the $5,000 policy; all the answers to the questions were obtained from her directly. The witness being asked if he did not say to Mrs. James at the time he solicited her insurance, knowing of the delayed Mutual policy, that the Occidental, having its home office in Los Angeles, could deliver insurance much more rapidly than other companies, answered, "No." He did not recollect whether he told her the rates of his company were less than others or that she could save money by taking a policy in his company. He said he did not know of the delay encountered in issuing the Mutual Life Company. The witness denied that he ever discussed with James the subject of the payment by his company of the life policy but finally admitted that he did say to James, after Mrs. James' death, "What are you going to do about this insurance?" The company had refused to pay the face value of the policy and one of the grounds of refusal, it appears, was that the assured did not pay the premium. The agent testified that Mrs. James paid the health and accident premiums but James paid the premium on the life policy. All premiums were paid in the shop in the negotiations of the three parties and the agent based his statement that James paid them on the fact that James took the money out of the cash register. He could not say definitely that James did not hand the money to her and she in turn passed it to him. There is no doubt but that the policies were issued because of the active solicitation of the agent.

Gene Waddle, unit manager of the Occidental Life, one of the companies contesting payment, testified that James called him by 'phone and he afterwards called at his shop. James said he wanted to talk with him and asked him to walk up the street with him and he followed him into a lavatory in the rear of a liquor store and asked him if he knew Mrs. James had insurance with his company. Upon being told that he did, James said he was anxious to learn and his [fol. 2672] attorney had asked him to inquire, what would be the status of his wife's policy, if issued out of wedlock. James explained they had planned on marriage but Mrs. James had been called to Long Beach on some dental work, which delayed the marriage, but they had since married.

No special significance is seen in the lavatory incident. It would be but natural that a policy holder or a person interested in a policy would care to know whether the existence of the circumstances above recited would render it void. The fact that a lavatory served as a place of privacy does not give any greater sinister significance to what was said than if the information sought had been given in the private office of the insurance company. There was nothing discussed that was not a matter of record, or was not known, or was not easily accessible to the insurance company's agents, and which would have inevitably developed upon the death of the assured. The information sought was as to the legal effect of admitted facts. James had asked the agent of the Mutual Life by telephone communication a similar question ten days after the ceremony was performed.

It will be recalled that the Mutual Life Policy had not been delivered to James, tested by Hope's testimony, at the time the act of destroying Mrs. James' life was commenced and fully accomplished. According to Hope she was dead in the early morning hours of August 5th. The policy was delivered (agent's testimony) at the barber-shop on August 5th. Of course, it was not delivered at the unseemly hours of 1:30 or 2 or 3 o'clock on the morning of August 5th. It was conclusively shown by the direct testimony of the agents who solicited the policies of insurance in which Mrs. Mary James was the assured that she was an active participant in procuring the same and herself suggested her husband as the beneficiary or consented thereto and there is no evidence of any coercion or over-persuasion on his part to induce her to name him as her beneficiary. There is evidence to the effect that he did introduce her to certain agents who had habitually importuned him to give them the names of prospective insurers, but her name, according to the agent's testimony, was given only after he had first obtained her consent.

There is no evidence in the record to indicate that James exercised any undue restraint over his wife. In fact, the evidence without conflict, is the other way. She seems to have come and gone as she pleased, and in every sense was a free agent. Her visit to Long Beach for several days, a very few days prior to her death, and her unexpected return home on account of her condition, and her visit to

her doctor's office and his call at her home, and her activities at the beauty shop and free intermingling with the public, and her association with friends, positively rebuts any implication of undue domination over her acts or volition by James.

The insurance companies refused to pay the sums stipulated in the policies and brought an action to cancel the policies. A cross-action was filed by James to recover double indemnity amounting to the sum of $21,400. All actions were finally dismissed by the payment of the sum of $3,500 to James.

The circumstances bearing on the death of Winona James, a former wife of the defendant, and the issuance of the policies on her life in which the defendant was the named beneficiary, are correlative issues to the Mary James transaction. Winona James was found dead in a bath tub in the cottage occupied by her and her husband, October 14, 1932, at Manitou, Colorado. The parties had set out soon after marriage for a visit to James' former home near Birmingham, Alabama. They went by way of Colorado Springs where [fol. 2673] they were to stop and negotiate the making of a lease of lands belonging to Mrs. James' parents to a tenant. While there they took the trip up Pike's Peak where the automobile disaster occurred which resulted in injuries to Mrs. James. Three weeks later she was found drowned in a bath tub at her home.

Mrs. Winona James was formerly a school teacher and latterly an accountant in an automobile business.

Evidence was admitted over the objection of the defendant tending to prove that the automobile incident which occurred in the jurisdiction of the state of Colorado approximately three years prior to the crime alleged in the instant case, and which resulted in serious injuries to his former wife, was caused in an attempt on the part of the defendant to take her life which purpose was finally accomplished some three weeks later by defendant causing her to be drowned.

The theory adopted by the prosecution in the instant case is framed and patterned after the theory announced in People v. Gosden, 91 Cal. Dec. 573, decided and published a short time before James was formerly charged with murder. The facts in the two cases are similar in some particulars and unlike in other particulars which have to do with the principle or theory upon which evidence of

another or other crimes are provable against a defendant on trial for a specific offense for the purpose of showing motive, intent, knowledge, absence of accident, or common plan or design. In the Gosden case the defendant's first and second wives, respectively, died from the administration of strychnine, a subtile poison. Defendant's knowledge of the effect of strychnine poison on the human system and the purpose or intent with which it was purchased by him, he, Gosden, claiming it was purchased for the purpose of exterminating rats, became important questions. There also existed a close similarity of the circumstances which attended the deaths of both wives. We held that sufficient reasons existed to justify the admission of proof as to criminal responsibility for the death of the first wife upon the trial of having murdered the second by means of strychnine poisoning.

In the instant case the theory of the prosecution was that James planned to kill his wife, first by procuring a rattlesnake and causing her to be bitten by it, but before its poison had accomplished his purpose he caused her to be drowned. As to the Colorado case the theory was that she was first made intoxicated, then hit on the head with a hammer and in an unconscious state abandoned to physical destruction in an unguided automobile sent dashing down the narrow, tortuous and precipitous Pike's Peak road. The motive attributable to each defendant is identical. The cause of death of Winona James is admitted to be drowning. The death of Mary James is claimed to have been caused by drowning. Both deaths are claimed to have been accomplished by the criminal acts of the defendant.

The cases which support the pronouncement that all that is necessary to admit proof of another crime where guilty knowledge or mistake or general plan or fraud or intent are the essence of the offense, is that a prima facie case be made out or that substantial evidence be given and there need be no showing beyond a reasonable doubt that the defendant committed the other crime, are not here questioned. In order to justify the admission of this character of evidence it should be of sufficient probative force to create a reasonable belief in the minds of the jurors that the other crimes were committed and the defendant committed them. [fol. 2674] Such evidence cannot be admitted if in character it is so vague and uncertain as to create suspicion only.

The suggestion procedure in some jurisdictions is that the relevancy of the offered proof should first be determined by the trial court upon offer made or by inquiry of the prosecuting attorney before the evidence is allowed to go to the jury. Vague and unsubstantial evidence of the commission of other crimes is clearly not admissible. (State v. Hyde, [Mo.] 136 S. W. 316; State v. Meininger, [Mo.] 268 S. W. 71; Bell v. State, [Ind.] 195 N. E. 274; State v. Howard, [Vt.] 183 Atl. 497; State v. Jones, [Wyo.] 191 Pac. 1075; Sneed v. State, [Ark.] 219 S. W. 1019; Lund v. State, [Ind.] 190 N. E. 850.)

The court is duty bound to carefully exclude all evidence as to other crimes not relevant to the main issue and which would only tend to degrade or defame the defendant or in anywise prejudice the jury against him.

The admissibility and sufficiency of the evidence admitted to prove that the death of Winona, which occurred in the State of Colorado in 1932, was accomplished by the felonious and premeditated act of the defendant, waiving the reasonable doubt doctrine, depends upon the further question as to whether it satisfied the rule which provides that such evidence cannot be admitted if in character it is so vague, uncertain or unsubstantial as merely to create a suspicion of guilt. Defendant further objected to an offer of proof of the other alleged crime claimed to have been committed in another jurisdiction distant more than a thousand miles from the place of trial and invoked the common law and statutory rights which vouchsafe the rights of an accused to be tried in the county in which the crime was committed. The ancient right cannot be denied in a case where punishment is to be imposed for the specific offense charged in the indictment or information. The right does not exist where the evidence of another crime is limited in its probative scope and effect to the purposes heretofore defined. The appellant complains that great distance from the situs of the offense deprives the accused in many cases of the means of discovering evidence material to his defense and, in effect, amounts to a denial of the process of the court to compel the attendance of witnesses in his behalf. (Cal. Const., art. I, sec. 13.) The point urged is illustrated by a matter which arose at the trial of the instant case. J. D. Rogers, the superintendent of Pike's Peak Auto Highway, a private enterprise, was brought

from Colorado as witness on behalf of the state. He testified that, upon his arrival at the scene where Winona James was injured and in attempting to ascertain whether she was breathing, he placed his head near her mouth and detected a strong odor of liquor on her breath. This evidence furnished support to the prosecution's argument to the jury that James had made her drunk befor- the automobile crash. This evidence would not have ordinarily been anticipated by the defendant in advance of trial, a contingency which frequently arises in the trial of cases. The appellant brought to the court's attention the fact that a letter had been recently delivered to him at the county jail, written by a party or parties in Colorado, outside the jurisdiction, who met and talked with Mr. and Mrs. James at the top of Pike's Peak a short time before they started down the mountain stating they could and would testify that there was no evidence or indication that either Mrs. James or James was affected by liquor. It appears from the discussion between court and counsel that the named party volunteering the information by letter and counsel for defense were acting in good faith in the matter and counsel, in [fol. 2675] asking the process of the court to produce the evidence by deposition or otherwise, was not derelict in disclosing the information. A continuance was moved that the deposition of said person might be taken to show that Mrs. James was sober and in a normal condition a short time before she received said injuries. No formal motion having been made by way of affidavit, the court denied the motion for a continuance for the purpose stated. The motion was renewed when the assistant district attorney in his argument severely arraigned the defendant for preparing his wife for death through the means of intoxicating liquor. It is so obvious as not to require more than a mention of the proposition that, in circumstances where the means of communication or opportunity for investigation and preparation for a defense and all the other recognized advantages which local contacts afford, are made difficult or inaccessible to the person placed on trial for a crime committed far distant from the place of the trial, every opportunity should be liberally extended to enable such person to meet any surprise evidence or unforeseeable situation arising at the trial, even at the cost of a continuance. The importance of the testimony of the two Colorado persons who offered to testify in rebuttal of the Rogers' evidence as to

the sobriety of Mrs. James is given added emphasis by the prominence this court has given the issue in its opinion herein as well as that given to said issue by the prosecution in argument to the jury.

We have heretofore referred in general terms to the evidence which the prosecution holds to be sufficient to support the implied finding of the jury that the other charge of murder was committed by the defendant. As briefly as possible we will further consider the circumstances from which the prosecution draws inferences which it claims satisfy the rule as to proof of other offenses and which, considered with the evidence relevant to the main case (limited to the purposes prescribed by law), constitute sufficient proof of defendant's guilt beyond a reasonable doubt.

Winona P. Wallace and James were married in July, 1932. She had been a school teacher before her marriage and later a bookkeeper for Howard Automobile Company. In 1932 C. A. Pries was engaged in selling insurance for the Prudential Life Insurance Company. He had been an acquaintance and friend of James and a regular patron of his barber shop for many years. Through the years he had suggested to Pries the names of persons who might become interested in the Prudential Insurance Company's plan of insurance. He had bought policies in his own name and had had a policy issued on his mother's life in the sum of $500 in which he was the beneficiary, long before Winona Wallace was thought of as a policy holder, and had advocated life insurance to others as a business investment and had advised an employee to consult Mr. Pries in matters of insurance. Some three or four weeks prior to May 20, 1932, he had talked with Pries as to a prospect he had in mind. He also had discussed insurance for himself. In keeping with his agreement, he invited Pries to his apartment where he met the insurance prospect, Miss Wallace. After discussing terms he (Pries) wrote an application for James in the sum of $5,000. After that transaction was completed James suggested that Miss Wallace take a like policy. Pries transacted all of the business connected with the Wallace policy with her. She answered all questions and paid the premium and James did likewise as to his policy. Pries advised the double indemnity policy, inasmuch as it was only one dollar more per thousand than the [fol. 2676] rate charged on straight accident insurance.

When the naming of the beneficiary was reached James said that he and Winona were to be married within a month or two and asked if that fact would affect the naming of himself as beneficiary. The agent told him it was necessary that he should have a beneficial interest in the insured but the beneficiary could thereafter be changd. Miss Wallace's estate was made beneficiary and after marriage James was made the beneficiary. The change was executed by the insured. Both policies were personally delivered to the parties who caused them to be issued. Miss Wallace also carried a policy in the sum of $1,000, issued in 1924 by the Kansas City Life Company, in which her sister was the named beneficiary.

James testified that, after marriage, a salesman, representaing Policy Holder's Life Insurance Association, called at his home and talked over with his wife a stockholders' insurance proposition which issued a $3,000 policy at the rate of $15 per thousand annually and, after talking it over, both concluded it would be a big saving to drop the Prudential policy and take a policy in the stockholders' company. She made application for two policies in the sum of $1,500 each, which were issued August 2, 1932. James was the beneficiary in said policies. There was no evidence of any attempt at secrecy in discussing any of the insurance policies or that any coercion or persuasion was used by James. In fact the evidence is without contradiction that in both cases the respective wives talked with the agents freely and separately and apart from the defendant.

The prosecution has given over-emphasis to a letter written by Winona's sister upon request of James and at the joint dictation of James and Pries, agent for the Prudential Company, signed by James and addressed to Dr. Hanford, who was the chief attending physician during the time Mrs. James was confined at the Colorado Springs hospital. The letter was written wholly at the suggestion of the insurance company's agent who wrote the policy and it had to do with the death certificate signed by the coroner, Dr. Gilmore. The agent was of the view that the report was incomplete in that it did not report the holding of an inquest. Further, inasmuch as accidental drowning was not of itself a compensable accident, that there should be shown, to entitle the claimant to double indemnity, in addition to death by drowning, merely an antecedent accident as the proxi-

mate cause of death. The understanding of the parties seem to have been that if an independent accident directly caused the drowning double indemnity was recoverable and this accepted view was termed by all as a "contributing cause" of death. The agent suggested to James that if the injuries to the head were the proximate cause of the drowning, such as causing a cerebral hemorrhage, or causing other symptoms, no doubt such as dizziness caused from sudden or unusual movements of the body following long confinement in bed by reason of head injuries, the coroner's report should show it, as the company would require a report showing an accident as a "contributing cause" of death. Dr. Hanford, the physician who attended Mrs. James for several weeks in a Colorado hospital, upon the receipt of the letter took the matter up with Dr. Gilmore with the result that the completed report showed the "contributing cause". The amended report, after consultation with Dr. Hanford and others, satisfied both the coroner and the insurance company and double indemnity was paid to James at Birmingham, where he had gone to visit with his people. There was nothing in the letter or in the trans- [fol. 2677] action itself that savors in the slightest degree of a criminal purpose. Further, it has no evidentiary relation to the main and important issue of the case. As a matter of fact no inquest was held. When the possibility of an inquest was mentioned James said he could not permit or bear to have an inquest held and requested the coroner, if possible, to forego an inquest. The coroner, after investigating and finding no suspicious facts or circumstances implicating James in the commission of a crime, dispensed with holding an inquest. This is taken by the prosecution as an attempt on the part of James to suppress evidence. None of the several employees of the Pike's Peak Auto Company who were at the scene of the wreck in 1932 and who were brought to this state and testified at the trial to physical conditions and in contradiction to alleged statements made four years prior thereto as to what was done and said by James in explanation of the wreck, made known by complaint or accusation any suspicious circumstances or any incriminating fact of which they had knowledge either in September, 1932, at the time the wreck occurred, or in October after Mrs. James' death at a time when the matter was in the coroner's hand for investigation. No action was ever taken by the Colorado authorities.

James became a witness in his own behalf and much of his testimony on material matters is uncontradicted. He and his wife left Los Angeles the latter part of September, 1932, shortly after their marriage, for a visit to his old home in Alabama. Before leaving they secured a loan of $150 on the Kansas City policy. They anticipated an extended visit and he leased his shop during his absence on a commission basis. As before stated, his wife's mother had authorized James to attend to the leasing of property owned by her in Colorado for a term of one year to a prospective tenant. His wife also had relatives in or about Colorado Springs whom they had planned to and did visit. In keeping with their planned itinerary, they left Colorado Springs about noon on September 21, 1932, to make the trip to the summit of Pike's Peak. They spent some time at the summit and started down the mountain at about 5 o'clock, as the sun was dropping behind the peaks. James said his wife expressed a desire to drive down and he yielded to her request. After they had gone a few miles he was viewing the scenery and the setting sun through a pair of binoculars or field glasses. The road was narrow, steep and winding. Many sign posts warned sightseers to "drive in the second gear". While thus engaged in sightseeing, he felt the car make a lunge as though moving through the air. We will not attempt to describe the movements of a car or to lay down a rule of action which should be observed by the occupants of a car in moments of sudden, impending peril. It cannot be done. James said he was thrown from the car with great force as it plunged down the mountain side and lodged against a granite boulder. The car landed upright but the wheels were crushed and the body was resting on or near the ground. It was otherwise badly damaged. James said he was rendered unconscious for the time being by being whirled over the rough ground for a considerable distance. As soon as he was able he went to his wife's assistance. He found her bleeding very freely from the forehead and side of the head. She was partly in and partly out of the car. He was in a state of great mental perturbation, suffering from shock and injury to the back and his right leg was rendered almost useless. It was then rapidly getting dark and he searched for his pistol to fire an alarm but it was gone. His purse was also missing and [fol. 2678] he was left penniless. He never recovered

either. All that his wife could say was "get a doctor". He attempted to lift her out of the car but found he could not handle her. In attempting to extricate herself from the car she had projected her head without the car and it had come in contact with granite boulders in the descent. After orienting himself as best he could he placed a blanket under and over her body and started to go back to the summit, which was the nearest station, to summon help but found the grade was steep and, as his injured leg impeded his progress, he changed his course and went down grade to Glen Cove, which, though somewhat further in distance was, because of his crippled condition, shorter in time. He reported the matter to the superintendent of the road and a crew of men in wrecking cars and with the necessary appliances went to the place where Mrs. James was left and in due time she was taken to the Beth-El Hospital, at Colorado Springs, where she was placed in the hands of two or three specialists in cranial surgery and two trained nurses. Telegrams were sent by James to Mrs. James' mother in Los Angeles, her father in Idaho, and to her sister. James found himself without money in the midst of mounting hospital, medical and nurse-hire charges. His father-in-law loaned him $100, one nurse was finally dispensed wtih, James and the father taking her place. The man in charge of his business at Los Angeles wired him $100. Mrs. James made good progress and after seventeen days, October 8th, her condition then permitting, and on her request, she was taken to El Cajon cottage on Capitol Hill at Manitou, a resort some six miles from Colorado Springs, to bring the costs within their means.

Mrs. James' wounds had bled profusely and her hair was described as a compact mass. James testified, and no attending or other physician was called to contradict the fact or the practice in such cases, that the attending physician had repeatedly given strict orders not to wet the hair or attempt to remove the dried and matted blood for fear of an infection. An operation had been performed. Mrs. James had become highly nervous and wrought up because of the refusal of her husband to wash the dried blood, which was crumbling in particles upon the bed clothing, from her hair.

On October 14th, James, after changing the bed linen, preparing breakfast for Mrs. James and putting the cot-

tage in order, left at one or one thirty o'clock in the afternoon to go to Colorado Springs to inquire as to the arrival of mail. He had been negotiating for several days with an insurance company for a loan of $250 on a policy of insurance and he expected a check from the company on that day. He also went to Colorado Springs to assure the hospital manager that his bill would be paid. It may be observed at this point that the check did come by mail a few days thereafter and was used to pay hospital and doctor bills and expenses of transporting his wife's body to Forrest Lawn, Los Angeles county, for burial. He had made a number of visits in anticipation of mail and on business matters in connection with his indebtedness as his creditors were pressing him hard for payment. He first went to the general store, which was a mile from his cottage, and there took a stage for Colorado Springs.

Alva E. Custer, the proprietor of the hotel at Colorado Springs where James had stopped during a part of the time his wife was at the hospital, was brought by the prosecution from Colorado and testified on behalf of the people. He had talked with James more or less about the accident and about his financial affairs during his stay at the hotel. [fol. 2079] Just before moving out of the hotel, James told him he was going to move his wife from the hospital to reduce expenses as he was then able to take care of her and did not have the money to keep her at the hospital and there was no use going deeper into debt. He said he had nothing to do but take care of her. He said the doctor had cautioned both him and Mrs. James against stooping over because it might cause dizziness and also against washing her head as it might cause infection. The conversation occurred more than a week before the witness heard of Mrs. James' death. The admonition of the doctor was elicited by the prosecution and no witness was called to refute it. It was repeatedly asserted by James. Custer saw James as he came to the hotel on the afternoon of the day Mrs. James died. He talked with him and inquired as to Mrs. James' condition. James said he regretted leaving her at the cottage but he had come to the Springs in anticipation of hearing from his insurance business and to see if the Company had left any word at the hotel.

Custer testified that James left the hotel on the day of his wife's death "mid-afternoon". "Q. Three or four

o'clock? A. Yes, that would be what I would think, around 4:00 o'clock. Q. About four o'clock? A. Yes." The distance from Colorado Springs to Manitou was six miles up hill. The time element is important in fixing the time when the defendant arrived at El Cajon cottage with Gerald Rogers, the deliveryman for Leonard's grocery store, who was with the defendant when the body of Mrs. James was first seen after death. Gerald Rogers fixed the time as "around 5 o'clock" in the afternoon. James, according to Custer, left his hotel about 4 o'clock. Custer did not know where he went immediately from the hotel. If he went to Manitou by foot he could not have made the distance in less than one hour and thirty minutes, according to Custer's estimate. If he went by stage, the way being evidently through a mountainous area and up hill, it would have taken him, at the rate of forty miles an hour, approximately twenty minutes to arrive at Leonard's grocery store where he made a purchase of provisions. James' cottage was another mile from the store. It is so improbable as to create a reasonable doubt that James could, within the time limits fixed by the witnesses, have gone from Colorado Springs by coach to Manitou, then walked to his cottage, drowned his wife, and walked back to the grocery store, purchased his provisions and returned in the grocery truck with the deliveryman, even though he had acted with unusual expedition. Such a theory has been advanced. If he drowned her it must have been before he went to Colorado Springs. The time element, it seems, would preclude any other theory so far as the evidence produced by the prosecution bears on the question. Gerald Rogers, who was with James when the body was discovered in the tub and assisted James in its removal, testified that the water half filled the tub, which was about four feet in length, and was lukewarm and the nude body was face upward and was quite warm. The water and the body were quite "soapy". The body lay with the head directly under the two water faucets, hot and cold, at the foot of the tub and her feet were extended over the rounded edge or side of the tub near the foot. The body was carried by James and Rogers to the bed and the coroner was immediately summoned. Gerald Rogers said that on several occasions James had ridden with him in his delivery truck making deliveries to his cottage. On the day in question, after

making purchases of provisions, James remarked that he wanted to ride with him. This was around five o'clock. [fol. 2680] Shortly thereafter they arrived at the cottage. Both got out of the delivery truck, Rogers carrying the groceries, and entered the front door, James in advance. James looked into the bedroom but his wife was not in her bed. Rogers continued into the kitchen with the groceries. He next saw James coming out of the dining room into the kitchen. James then opened the bathroom door and called to Rogers, who looked into the bathroom and saw Mrs. James in the bathtub as above described. Her eyes were open but she was dead. Her mouth and nose were slightly below the surface of the water. A package of Pearl Soap flakes which was kept in the kitchen had been removed and the bath water was heavily impregnated with soap and her body made slippery by it. Her nightgown was in a corner of the bathroom. The cottage was situated at the top of Capitol Hill and there were a number of cottages, both occupied and unoccupied, within half a block of the James cottage. There is nothing in the testimony as to the bathtub occurrence, save its tragic cast, which has any incriminating significance. It cannot be otherwise construed except by the indulgence of suspicion and surmise, or by reversing the rule of law as to the indulgence of presumptions and inferences by casting the burden on the defendant and resolving all inferences against him.

James said his wife suggested going to Manitou and renting a cottage. He wanted to take her to her cousin's home, the Yarnells', but she objected to going there. The defendant acted as her night nurse at the hospital. Mrs. James' father also helped to nurse her. At the cottage James personally prepared her meals, bathed her and attended to her needs. The defendant went to the store and postoffice every day to buy provisions and mail letters written by Mrs. James. On the day in question he prepared her lunch and performed the household duties and, about one o'clock, started for Colorado Springs. He called at the hospital and, having finished his business, he went to the hotel, where he had formerly stopped, to inquire for his mail. It was not earlier than 4:30 when he got back to Manitou. He went to the grocery store and made his purchase of groceries, riding home with the deliveryman as heretofore told. On entering the cottage he found she

as not in ner bed. It is not necessary to repeat the story substantially told by Gerald Rogers as it adds nothing to what has been told. James testified that Winona, whom the Superintendent of the Pike's Peak Automobile Highway Company said had a strongly liquor laden breath, was a consistent abstainer from the use of liquor in any form and no evidence of any effects of liquor was reported by any of the physicians or nurses who attended her.

Another collateral issue brought into the case upon which prejudicial error is also earnestly urged by the defense is the testimony of Miss Yarnell, a cousin of Mrs. James, with respect to certain "advances" made to her by James. Miss Yarnell was a resident of Colorado Springs and she visited Mrs. James every evening when she was in the hospital and all but one or two when she was at the cottage. She drove James every day from the hospital to his hotel and frequently took him on drives about the city. She went to his room at the hotel and wrote all of his letters. She testified she had seen Mrs. James get out of bed and walk—the distance was not stated. She did not see her out of bed on any occasion at the cottage, but saw her sitting up in bed. She never heard her complain of dizziness. Her hair was matted with blood. The "advances" spoken of consisted of offers to kiss her a couple of times while driving. He attempted [fol. 2681] to kiss her in his room at the hotel but she told him to "cut it out". She continued to write his letters and to extend many favors to him. When he left with his wife's body for California she kissed him good-bye and he gave her some money for her many kindnesses, especially in driving him about the city. She visited Los Angeles some time afterward and she met and talked with him. The people rely on the Gosden case, supra, as an authority for the admission of the kissing episode above related. The Gosden case adopted a quotation from People v. Smith, 55 Cal. App. 324, 335, holding, to quote the exact words, that "evidence tending to show illicit relations of the accused with another is admissible to show lack of love and affection for the defendant's lawful spouse". Pierson v. People, 79 N. Y. 424, 435, is also cited in the Gosden case as authority showing motive where the defendant married the wife of the deceased within one week after the husband's death. Under the facts of that case it was held that it might be inferred that Gosden's interest in the woman with whom

he had illicit relations, antedated the death of his wife. It is a far cry from the cited case to the instant case, in which it was contended all along that the insurance money was the motive for the alleged murder, until, for the moment, the prosecution changed the motive to lustful or matrimonial reasons when, as a matter of fact, there is no evidence to sustain the contention that before, at the time of or since the death of defendant's wife there were either illicit relations or desire or design on defendant's part to make Miss Yarnell his wife. Her testimony and conduct exculpate both herself and the defendant. Other instances in which collateral matters, which had no more than a colorable claim to admissibility but which decidedly tended to degrade the defendant on trial, include the sordid story of Madge Reed. No one can conclude from her testimony that James was moved to kill Mrs. James because of any desire to make Madge Reed his wife. The fact stands out that he did not marry her or make any effort to marry her. These collateral matters, valuable only for prejudicial effect, should have been excluded.

There are two uncontrovertible obstacles which stand in the way of the prosecution's theory that James planned to kill his wife with the hammer which was left on the blood bespattered floor of the automobile, covered with blood. The hammer, James explained, was taken from the rear of the car the day before and used to change a tire. He had not yet returned it to its proper place. The question which presses for answer is why, if he took his wife up the mountain to kill her and planned to give the cause of death the appearance of an accident, did he not make certain that he had executed his murderous design? He was not pressed for time. In fact, he was at the scene of the accident for some considerable time. Again, how can the fact be accounted for on any reasonable theory that the deceased, who was attended by two or three physicians and two nurses, in the care of her father for a week or more, and daily visited by Miss Yarnell during her three weeks of illness and convalescent period, made no complaint and gave no hint that her husband had attempted her life? The prosecution suggest possible retrograde amnesia, loss of memory for a period just preceding a blow administered to the head, or, that Mrs. James, the former automobile company bookkeeper and school teacher, whom James testi-

fied never drank any kind of intoxicating liquor (and no one testified that she ever did), placed on a dangerous road, rendered herself unconscious by voluntary intoxication as [fol. 2682] to everything that happened just prior to receiving the injury. Another question that cannot be satisfactorily answered is, why did not James, having planned to kill his wife with a hammer, after using it, throw the bloody instrument into the depths of the canyon or cavern for concealment, which the ruggedness of the country so abundantly invited? The inferences are that James was not drunk. The witness who detected a strong odor of liquor on Mrs. James' breath did not detect any on James'. The fact that the attending physician removed particles of granite rock, which were imbedded in the wound in the side of Mrs. James' head, is additional refutation of the theory that she was struck on the head with a hammer or blunt instrument in the hands of James. That her body was thrown against granite rock, both in the descent of the car and by its impact with the boulder which stopped its course, does not admit of doubt. The windshield was broken. The wound on the forehead contained no granite particles.

J. D. Rogers, and several other employees of the Pike's Peak Auto Highway Company, were witnesses for the prosecution. Rogers testified as to the safety of the highway and the infrequency of accidents occurring on it. The testimony of these witnesses as to alleged contradictory statements made by James four years in the past with respect to the proprieties with which he conducted himself in the circumstances of the situation, (largely mere matters of detail and order of events) bear the infirmities of uncertain memory which might be expected. It is claimed that they were inconsistent with and contradictory of other statements as to the manner of and the cause of the car going off the road and as to James' acts immediately thereafter. Rogers testified that he found in the rear of James' car a pint or quart bottle of liquor about two-thirds full. He thought it bore a Mexican or foreign label. James testified that he purchased three pint bottles of liquor on a physician's prescription which he was taking to his aged mother, residing in Alabama, who needed stimulants. Alabama was strictly closed to the sale of liquor. We will not undertake to discuss the probative value of such testimony. The uncertainty and weakness of testimony given in an attempt

to recall statements and conduct, estimates as to distance and the situation of objects which are not sufficiently important or exceptional as to make a lasting impression on the mind at the time they occurred, is to be expected. The important question in the case is—was it shown by material, substantial evidence that James attempted to kill his wife on the automobile trip to the summit, and that he failed to execute his premeditated purpose? He set out soon after the accident to bring assistance and witnesses to the scene. Rogers testified that he saw footprints along the side of the track of an automobile for some distance before it appeared to leave the grade. The footprints were not examined until a crew of seven or eight men had been at the scene of the accident for three hours. He said there was some dust in the roadbed which was graveled Rogers could not say the footprints he saw fitted James' shoes. He thought they were made by a man. A number of people and automobiles had been on the road on that day, James being the last to check out. Rogers' testimony on many subjects of inquiry shows much uncertainty as to the exact fact. James claimed that he put one of the robes under Mrs. James and about her body, but Rogers said he found none and took one or two from the back of the car and him-[fol. 2683] self placed it under her body. He did find one in the fore part of the car. He did not observe James showing signs of injuries but he said he did hear him moaning once or twice. He mentioned what he felt were failures to properly provide for Mrs. James' comfort before he left for assistance in the stress of the situation. James' testimony is that Mrs. James was bleeding very profusely and he was fearful she would die before he could summon medical aid. It was asserted in argument to the jury that the defendant was a "cunning and artful plotter". If he had deliberately planned the murder of his wife with a hammer on Pike's Peak it would seem to have been more in keeping with the prosecution's characterization of him if he had done the things the prosecution denounced him for failing to do and arranged things in orderly fashion in order to deceive the officers he went to summon and, in so doing, taken pains that no tell-tale evidence such as the instrument of death should be a witness against him.

We are of the view that if the proof as to the Colorado murder had been placed before a court exercising civil juris-

diction upon the same evidence adduced upon the trial, the court would clearly be compelled to grant a motion, if made, to direct the jury to return a verdict for the defendant.

There was admitted into evidence, against the objection of the attorneys for the defendant, a purported confession made by James. The objection was based on the ground that the confession was not shown to have been made voluntarily and free from duress, menace, fraud and without hope of favor or reward, as provided by law, but was exacted by a course of cruel and insufferable treatment, participated in by a dozen or more investigators connected with the office of the district attorney, police and deputy sheriffs of the city and county of Los Angeles and persisted in to the point that the defendant was rendered too weak to withstand further physical beatings and mental torture with which he was threatened. The defendant was taken into custody on Sunday morning, April 19, 1936, about nine o'clock, some days after a dictaphone connection had been installed in his residence. The investigation squad actively engaged on the case consisted of J. C. Southard, in command, Charles Griffen, chief assistant of the bureau of investigation, Deputy Shreiff Williard Killion, and Investigators Everett Davis, Gray, Scott Littleton, Harry Dean, John L. Martin and Earl E. Kynette. All of said officers were unquestionably working together actively day and night with the definite purpose of forcing the defendant into a confession.

On Sunday morning, April 19, James was taken from his home at 3886 La Salle avenue by Southard, Griffen and Dean, investigators, to a private house next door, 3882 La Salle avenue, occupied by the officers for spying and dictaphone purposes, where the dictaphone's part in the case was explained to him. This was done for its psychological effect. Southard said he took "quite a crowd" with him at the time he and the officers took James to the house and exhibited to him the dictaphone apparatus. A number of newspaper men, District Attorney Fitts, Deputy District Attorney Williams, Officers Scott Littleton, Davis and Dean were among the crowd present. He was then taken to the office of Lieutenant Morgan, where he was questioned for more than an hour. He was next taken to the district attorney's office (Sunday forenoon) where he was examined at great length and was called upon to defend himself against grave charges made by the officers. Asked if James was

informed that a charge of murdering his wife was under investigation, Southard answered: "I believe not." Attor- [fol. 2684] ney S. J. Silverman, who had been James' attorney in civil matters for some time and had heard that an attempt was being made to have James indicted for the murder of his wife, and James himself, testified that Silverman had instructed James to decline to answer any questions bearing on the alleged homicide except when Silverman was present. At any rate, James refused to talk after he was asked the first few questions and, according to Southard, he told Fitts "to go to hell". They kept right on questioning him. Mr. Williams, a deputy district attorney, Griffen and several other investigators were present. Southard said it could have been possible that they told him they had the goods on him. The arrangement under which James was "worked on" was that he was placed in a large chair, where he was compelled to sit for forty-eight hours, according to the admissions of Southard and other investigators, but, on the showing in the record, the questioning must have continued for sixty hours. The investigators worked in pairs on four-hour shifts. From sheer exhaustion the defendant several times fell asleep. Never less than two and as many as eight or ten officers were plying the defendant with questions at all hours of the night. The alleged confession began to break, after days of unremitting effort, at 1:45 o'clock in the morning. No one, not even Mr. Silverman, the defendant's attorney, or Mr. Parsons, had knowledge of the place in which the defendant was held in private custody by the investigators. Neither his friends, relatives nor the public knew the place of detention. No warrant of arrest had issued and there was no public record, or any record, which would enable anyone not a member of the staff of investigators to know of or discover the presence of defendant.

The law prescribes the places in which persons charged with crime may be detained. A private house located in a residential part of a city and not complying with the provisions of law prescribing the purpose and use of county jails and their management, is not a place where persons charged or suspected of crime may be lawfully detained. Grave abuses may be practiced against persons thus illegally held in secret confinement. (Pen. Code, sec 1597, et seq.) Every police officer who, having arrested any person

upon a criminal charge, wilfully delays taking such person before a magistrate for examination is guilty of a misdemeanor. (Sec. 145, Pen. Code.) In the instant case the defendant was held in custody seventeen days without the issuance of a warrant and without being taken before a body which had power to examine the offense with which he was finally charged. He requested that his attorneys, first Mr. S. J. Silverman, whom the district attorney had reported out of the city for the week-end, and then Mr. R. E. Parsons, be contacted. Neither appearing to be immediately available, the inquisition, in which a number of the investigators took part, was vigorously and unremittingly pressed, without delay, through many hours. It was not a proceeding authorized by statute and no sufficient reason was or could be shown why the request of defendant for advice of counsel, a right guaranteed by the Constitution and by statute to every person charged with crime, was not complied with. Section 849 of the Penal Code provides: "When an arrest is made without a warrant by a peace officer * * * the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint, stating the charge against the person, must be laid before the magis- [fol. 2685] trate." Section 859, following the procedure above cited, provides that the magistrate must allow the defendant a reasonable time to send for counsel and may postpone the examination for that purpose. Upon request of the defendant, the magistrate must require a peace officer to take a message to any counsel in the township without delay and without fee. These and other provisions of the statute cannot be circumvented by resorting to any methods which tend to deny the rights and protection which the law guarantees to every person charged with a crime. The statutes impose quite substantial fines and terms of imprisonment upon peace officers for the wilful disregard of their duties. (Pen. Code, secs. 145, 147 and 149.)

Early in the confinement of the defendant, Officer Southard committed an admitted battery upon him. He and Officer Griffen were "working" on the defendant when Southard struck him, according to his admission, in the face or on the side of the head. We quote the incident as related by the assistant chief of the bureau of investigation of the district attorney's office, Charles Griffen. Officer Griffen

and Officer Southard were the principals in directing the investigation. He and Southard began their four-hour assignment of questioning at four o'clock Monday morning. Everett Davis was present. They had not met with anticipated success. Griffen introduced the subject by saying that the defendant had been giving answers (no doubt unsatisfactory to them) all morning and Jack (Southard) said: "Your wife Mary was a very sweet girl, very nice woman; she was well thought of by her friends; seems to have come from a good family and it is a shame she had to die the way she did in this pool out there." James replied: "She was not very much. She was a whore when I married her." Griffen said that Southard was sitting in a chair opposite to James and he reached over and slapped him. Griffen then said to Southard: "Take it easy, Jack." The remark reputed to James was a strange statement for a man under investigation for the murder of his wife, before hostile inquisitors, to make to his accusers. James testified that he had told Southard and Griffen "a hundred times", as they repeated Hope's rattlesnake story and the murder of his wife to him and used violent means to compel him to adopt it, that he didn't know what they were talking about and that it was because of his refusal to affirm Hope's story that he was struck. Griffen said that after James was "slapped" they continued to question him but he saw no other violence inflicted upon him. Griffen questioned him the next night until one o'clock a. m. During all the time he was being held incommunicado he did not see James sleep. Griffen volunteered the statement that during all the time he was in custody he was in "much better shape physically and mentally" than any man who worked on the case! This evidence was stricken out but other officers testified substantially to the same thing. James had then been questioned, admittedly for forty-eight hours. There is evidence that it was longer. Several of the officers testified that he was cool and collected at all times and he answered all questions at great length and gave them information they did not formerly have. Griffen said James did complain about his ear, but he examined it and couldn't find anything wrong with it. When Griffen returned to the place of examination at nine o'clock, five other officers were with James. At 8:30 he was taken by Officers Kynette and Davis to Ninth and Alvarado streets. Griffen and Southard followed. At noon he was taken to the district attorney's office. Griffen did

not recall whether James, when at the district attorney's [fol. 2686] office on the day he was taken into custody, had requested that word be sent to Mr. Silverman, his attorney, requesting his presence. On Tuesday he saw the defendant from seven o'clock to one p. m. At eleven o'clock he gave instructions to "book him" at the county jail, where he was committed to the "High Power Tank".

Southard admitted that the investigators operated in relays of pairs for a period of forty-eight hours. The defendant sat in a chair and was not allowed to remove his clothing. Several times he fell asleep from fatigue and exhaustion. Southard's statement as to what he said to James about his wife being such a beautiful little girl, etc., was given in the same words as Griffen's story. James' reply, being somewhat different in substance, we repeat it: " 'Aw, leave me alone and quit questioning me about her. She wasn't so much before I married her. She was only a little whore before I married her,' and I lost my temper and slapped him." The defense contended that no such words were ever uttered by James at any time with respect to his wife and it was solely Southard's disappointment in failing to have broken James down by harassment, coercion and physical violence, to the state of accepting Hope's sensational story (which was a composite product of the detectives and investigators in collaboration with Hope) which ired Southard to the point of physical violence. Southard had been an investigator for eight years and was seasoned to his task. His act was inexcusable and was in violation of section 149 of the Penal code, which provides that: "Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years." The defendant was under no compulsion of law or duty to answer the officers in any particular manner or at all. Several apparently disinterested witnesses and one or two officers testified absolutely that James' face showed black and blue and swollen spots which were plainly visible for several days after his arrest. He testified to terrible beatings he received in the private house in which he was detained and that his body was made black and blue from the waist up and that he had suffered a hernia or rupture from the roughing which he passed through. A physician who had examined his abdomen five months prior testified that he had observed no evidence

of hernia at that time but an examination since his arrest clearly disclosed the existence of a hernia. The prosecution called a few witnesses connected with the official staff who testified they did not observe any bruises on the defendant's face but, in the main, their testimony was more in avoidance of direct and positive answers which should have been given by officers of the law. There can be no possible doubt, as testified to by one or two of the officers themselves, and by independent parties, that the defendant's ears bore marks and bruises which anyone at all observant should have seen. James said he was practically made hard of hearing by the head beating he had received from Southard and Griffen, and that his body was black and blue from the waistline upwards. Despite the admissions of the several officers who were most active in conducting the plan of continuous questioning, that James fell asleep several times while being quizzed, from sheer fatigue and exhaustion, nevertheless several of said officers testified, as astounding as it seems, that James was at all times exceptionally cool and calm and showed no signs of mental distress or fatigue, and was [fol. 2687] actually in better physical condition than any one of his inquisitors. And this, too, in spite of the fact that the questioners worked in pairs of four-hour shifts while James admittedly was carried through a sleepless ordeal of not less than forty-eight hours, but more probably sixty hours, with as many as eight or ten investigators plying him with questions. As an example of the evasiveness which characterized the testimony of the investigators generally, we quote from Jack Southard, acting chief of inspectors, as to James' physical appearance at the time he delivered him, after several days of private custody by said officers, to the proper place of detention, the county jail.

"Q. Did you notice any marks or bruises upon his face or head when he was taken into custory? [delivered into legal custody at the county jail.]

A. Not that I recall.

Q. Well, you did notice marks and bruises upon his head when you took him to the county jail, didn't you?

A. No, I don't believe so.

Q. Weren't both of his ears bruised and swollen at that time?

A. They were not.

Q. Neither one of them?

A. That I wouldn't say; one may have been; I wouldn't be positive. I know that both were not.

Q. As a matter of fact you know that one was, don't you?

A. I do not. I saw that one in court.

Q. You saw the bruises here when he was in court?

A. The left ear was a little bit swollen at the top. * * *

Q. He was pretty well worn out when he got to jail, wasn't he?

A. I couldn't tell you." (Emphasis supplied.) He fixed the time he observed the bruises he was then testifying to as of the day he was before the grand jury on the incest charge. The foregoing equivocal testimony as to bruises that were visible on the defendant's body is characteristic of the testimony of the officers in whose personal custody the defendant was held for approx' .ately two weeks. Why he was thus held incommunicado has not been and cannot be accounted for by any theory, except the practically admitted one of forcing the defendant, by the use of physical and intense mental punishment, into making a confession corroborating the unnatural, weird and astounding statement which was in the hands of the investigators and commonly referred to as Hope's story or confession. On cross-examination Southard was asked these pertinent questions to which objections were sustained on the ground that they were immaterial:

"Q. Now, Mr. Southard, when you arrested the defendant why didn't you take him before a magistrate? [Objection sustained.]

Q. The reason you didn't take him before a magistrate at once was because you wanted to get a confession from him, wasn't it? [Objection sustained.]" Southard said he gave instructions that James was not to be left alone at any time; one or more investigators was questioning him at all times; some questions he answered and some he refused to answer; he would just sit and look blankly. Southard testified that he had three meals a day but James testified that he was practically starved into a state in which he told the investigators that he would answer any question in any way that the investigators wanted him to answer it. It is the admitted fact that he was interrogated by the district attorney and his assistant, Mr. Williams, at all hours of the night, for as many as two and a half to three hours. One period continued from one o'clock to six o'clock. The officers also took part in interrogating the defendant. The plan

adopted was that the investigators worked on the defendant to a point where it was deemed expedient or advisable to take him before the district attorney and if satisfactory progress had not been made he would be returned to the private custody of the investigators for the employment of [fol. 2688] such methods as would work a change of mental attitude on the part of the defendant. No other possible answer could be made to their unauthorized action which only ended with the procurement of the alleged confession. At times numerous officers would be present and sometimes, James testified, he was left with but one officer. The evidence adduced by the prosecution affirmatively shows that the defendant was shifted back and forwards in the manner herein described many times at all hours of the day and night, continuing over a long inquisitorial period. At times Hope was brought into the room, and engaged James in controversial disputes.

Officers Killion, Gray, Griffen, Littleton, Davis and Southard were most active in procuring the alleged confession of James. The first signs of a confessional collapse, as told by Killion, occurred at midnight, May 2, thirteen days after James was taken into custody. At the above hour, in the room adjoining the district attorney's office, James said to Killion, "Why don't we go out and get something to eat, and I will tell you *the story.*" The conference began at about one in the afternoon and ended at about 2:30 or three o'clock the following morning—a short intermission having been taken for coffee and sandwiches. The reference to "the story" explains the purpose uppermost in the minds of Killion and Gray and accounts for James being in their exclusive custody at the midnight hour instead of being in jail. Killion's reply to James' proposition was, "All right." Killion and Gray then took the defendant to a restaurant at 5th and Figueroa. Killion said he once wrote shorthand. The notes he used to refresh his memory were, to use his words, "some in shorthand, and some in longhand, and some in scribbling". They seemed to have been entered in desultory order in a book and covered thirty-one pages, all of which he said he took during the time he and Gray had James at the restaurant. They had a steak dinner and Killion bought James a cigar and James said, "Now, you want to have this story," and Killion said, "Yes". James said, "All right; there is no hurry, is there?" Killion wanted

him to go back to the office (where the district attorney, his deputies and the investigators were waiting) but James said, "No, this is all right, isn't it?" Killion replied, "Sure, it is all right." James testified at the trial that practically everything he told Killion, Southard and the district attorney concerning the death of his wife was the story which the investigators had drilled into him for hours for several days. He said he was not able to stand further beatings and physical punishment with which he was threatened; that if he gave an answer to a question which did not suit the questioners he was struck on the head. He had also received one or two terrific beatings at the hands of Southard and Griffen; he would have preferred death rather than be returned to the private residence, which the officers threatened to do, where most of the punishment was inflicted. The story he told Killion had been repeated a "thousand" times to him; for days when they repeated to him Hope's story he told the officers that he did not know what they were talking about until he was finally coerced into submission.

The story which Killion reported as James' confession at the midnight dinner contains a great many of the things Hope testified to with added wickedness, equaling, if they do not surpass, the rattlesnake horrors. James is reported as saying that he and Hope were to split the insurance money. Hope asked James to let him "bump Mrs. James [fol. 2689] off". Hope also suggested a fake holdup in which he was to shoot her. Hope told Mrs. James he was a medical student and could produce a miscarriage and Mrs. James wanted him to relieve her pregnancy. Hope had asked James why he didn't kill his wife and get the insurance inasmuch as she was sick and dying. Hope said he would get a rattlesnake "that would kill her quick". He and Hope got drunk frequently. Finally James realized that they were doing wrong and he said to Hope, "We are both nuts". Hope said he had to have some money. Hope proposed getting a spider. He brought some spiders home and James threw them out. Hope then began a quest for snakes. On Saturday night Hope and Mary talked about an operation, but both got drunk and Hope left. Hope came back Saturday morning (two days before her death) half drunk and he and Mary got drunk. Hope said he was going to do the work and at one o'clock James drove away in his car. He knew Hope was going to kill Mary with

the snakes within an hour. He came back in two hours and Mary was pretty sick in bed. She didn't know what had happened. She was very drunk. He spoke to her and she said she was very sick but she would be all right tomorrow and she kept calling for him. James said the letter written by Mary to her sister was at his dictation; that he got her drunk and had her write it. Hope left, and James drank all Sunday. Hope came back at six o'clock Monday morning, and asked if Mary was dead, and James said, "No, she is all right", and Hope inquired if the snake had bitten her and James said he didn't know. He said she was all right. Hope looked at her leg, which was black, and he told James that he had turned the snake out, and he asked "what will we do". James said, "I am going to get drunk". Hope told James to go ahead (and get drunk) and he would finish the job and James asked him how he was going to do it and Hope said, "I will set the house on fire and in that way we can get [rid of] everything". Hope said they could not quit now—"they would know about the snakes".

James said he felt like taking a drive and went out Wilshire Boulevard and then to his shop, and Hope came into the shop, Monday, August 5th, between twelve and one o'clock, and they went to Melody Lane for lunch. It will be recalled that two or three of James' former workmen testified that James was out for lunch not longer than twenty or thirty minutes and appeared perfectly sober and normal. At lunch Hope said, "Well, I got rid of her", and James asked if he had burned the house, and Hope answered no, that he drowned her in the bathtub, and James said, "Well, you are the craziest son-of-a-bitch I ever saw". They had a big argument during which James said, "Don't you know they will throw me in jail tonight? I had a wife drown in Colorado in a bathtub and I know I will be in jail." Hope told him his wife was too sick and drunk to know when he put her in the tub; he said he "put a belt around her arms, and tied her", and James talked about the Colorado wife. James then said, "Well, I went in with you, and I will take the rap. I have no defense". James then gave him $30. Hope told James he had cleaned up the house, burned the blankets, sweaters, etc., and had thrown the body into the fish pond. Hope said he had taken all the evidence to his home and destroyed it. James said to him, "You damned fool, did you burn up that stuff",

and Hope said, "Yes". James said the woman, Hope's [fol. 2690] girl or wife (he didn't know which), will "spill everything" and Hope said not to worry about her, "he had enough on her to hang her". Hope said she knew everything but she would be afraid to talk. James volunteered that he had a notion to kill Hope but he was afraid if he did the woman would talk and he "didn't want to have to kill them both". Hope assured him that he had enough on that woman to keep her from talking. Hope said while he was in the Verdugo home trying to have the snake bite her, some people came but he had the blinds down and the doors locked. James said that was probably the time Ethel Smith and her party were there. Hope had told James if he could "kill Mary as he had", they could get double indemnity on the insurance and they "would split it 50-50."

James was afraid of what Hope had done and when he went home Monday night he took the Pembertons with him. The various sums of money Hope claims James paid him, $100, $30, $25, and $100, were restated. James said he made up his mind to kill Hope, but Mrs. Hope knew as much as Hope, so he did not execute his intention. James told Hope he would share $5,000 with him as soon as the insurance companies paid. Hope came to James one night about two weeks before James was arrested (this would be in April, 1936) and was "beefing" about money and James said to him, "We played and lost" and "I am not going to be chiseled any more for money". Hope said if he didn't give him some money he would "squeal". James replied, "All right, squeal go ahead and squeal." (It appears that Hope became insistent for money about the time the lawsuit involving the payment of the insurance money was filed.) At this point, according to Killion, the restaurant confession was concluded by James in the following language: "Now, that is the story, and I never would have told it, if Hope hadn't squealed. There isn't enough men in the District Attorney's office to make me talk."

The record shows that at least three members of the district attorney's staff and some ten or twelve investigators and officers had to this point been making continuous and vehement efforts to get a confession from James. Immediately James was taken to the district attorney's office by automobile where District Attorney Fitts, Chief Deputy Attorney Stewart, Chief Blummer, Officers Griffen, Jack Southard, Davis, Killion, Gray and Miss Adams, the state-

ment reporter for the district attorney's office, were assembled. Hope was also present. It was then around two o'clock in the morning. James was greeted as follows: Mr. Fitts: "Mr. James, the boys have told me that you told the story." Mr. James: "They have got it". It was suggested by the district attorney that he begin in his own way and relate the story. James answered that it was a very long one and it would take three or four days to tell it. He began by telling of Hope coming to his house under the influence of liquor July 3rd or 4th, saying he was broke, without work, and his "gal" had thrown him out and he didn't have a place to sleep. James said he and his sister, Mrs. Murphy, were doctoring chickens sick with roup. Hope was drunk and James would not let him stay that night, gave him a dollar to get a bed and told him to come back sober, and he could stay until he got on his feet. He came back the next day and stayed two nights, occupying the sleeping porch. The third night he did not appear. Mrs. Murphy, a telephone operator of Morris, Alabama, and sister of James, was visiting him. She met Hope and prepared the meals. Mrs. James was then attending the Long Beach dental con- [fol. 2691] vention. Mrs. Murphy corroborated James as to Hope coming to his home drunk and entering the garage where they were doctoring sick chickens and James giving him a dollar and sending him away for the night. Hope said James first discussed the killing of his wife when she was in Long Beach. Hope knew her life was insured and said: "She is going to die anyway; why don't you kill her?" James said he couldn't do it and Hope said he would "take her up here and shoot her in a holdup". James replied that a lot of people had been hung for that. Hope then said he had been working with "a bunch of racketeers" and he had a white powder in a box that would kill in five minutes by breaking the skin on the hand and rubbing it into the wound. He wanted to try it on one of James' chickens, but James told him it was ridiculous. Hope then said he would do the job himself with a couple of snakes. It was agreed that James would give him half the insurance money. James gave him $20.

When Mary came back from Long Beach she was pregnant and sick and she finally decided she could not go through with child delivery, and wanted James to take her to a doctor. James said he did not want her to abort. She said, "Hope

tells me he is a doctor. Why don't you let him take care of it?" Hope disappeared and did not return for two weeks. Hope had told her he was a medical student and she asked James if he was and he said yes. Hope talked with her and it was agreed that he would take care of her. The abortion was to be performed Sunday morning, August 4th. James said if Hope put Mary's foot in a box in which there was a snake or snakes he never saw it. They had agreed to let the snake bite her. Hope would never tell where he got the snakes. Some of his snakes wouldn't strike and those that would were not venomous. Hope put rats, chickens and a rabbit in the box and nothing happened. In fact he put a rabbit in the box with one of the snakes and the next morning the rattlesnake was dead and the rabbit was walking around. He laughed at Hope and told him to lay off. Hope took his car one morning from the place where James was having it greased. He was gone three days and came back drunk. He said he had been to Phoenix, Arizona, to get black widow spiders. This was before he brought the third lot of rattlesnakes. He said, "All you have to do is throw them in bed with her and they will bite her". James said he laughed and threw his "damned spiders" out. Hope came over to his shop and James said, "Hope, you are nuts and so am I. Forget about it". He said he would. When James next saw Hope he was drunk. James said Hope was nuts when drunk. He said to James, "Come out here, I have a tip where I can get hot snakes". James told him he didn't want him to get any more snakes as they would get them in trouble. Hope said James was not going to walk out on him. He wanted to make some money. James gave him $6 on Saturday night and he got two hot snakes. His wife was with him and knew "to a certain extent" what they were to be used for. Hope took James home and they both got drunk. Mrs. James drank with them. "She dearly loved booze. No matter *how sick* she was she loved a drink." It may be parenthetically remarked that much of James' statement made after his midnight dinner as offered by the prosecution, reads as if he was intoxicated when he made it—particularly the last quotation as well as other parts. The snakes were in the box which Hope put in the garage and said he would be back in the morning. Before leaving Hope talked over with [fol. 2692] Mary the performing of the abortion on the next day. She was happy to have it done. James never quit

drinking all night long and was quite tight when Hope arrived next day at eleven o'clock. James gave Hope $100 and left about one o'clock and returned about four o'clock Sunday afternoon. Hope told him she would die in "an hour, or fifteen minutes". James went in to see her. Hope had her full of liquor. Hope was very drunk himself. Two or three bottles were in the room. Hope took care of taping her eyes and mouth and tying her arms.

At this point Officer Killion interrupted by asking James if Hope told him (James) when he was about to leave, if he was going to do the work, and James answered that he did and he told Hope he couldn't have anything to do with it because she had been too good to him and he just couldn't have "anything to do with *that part* of it." James had previously said that he had opposed Mary going to a doctor for the performance of an abortion as he felt her health would not stand it. From the subject matter both before and following the "work that was to be done," the reference is clearly to the abortion that was to be performed. Continuing, James said he was very drunk and got into his car and just drove around. When he came back about four o'clock he asked Hope how Mary was but Hope was so drunk that he didn't know what he was about. Mary was in bed covered up and made no complaint as to illness. Hope took the car and returned at six o'clock the next morning. He did not take the snake with him. When James came back, Hope told him he had put Mary's foot in the box and the snake had bitten her three times, but it had no effect on her. He further states that he had inoculated her in the leg and had performed the abortion. She complained of her leg hurting her. James said he was all upset and he and she sat and drank all night. He didn't think she felt any snake bite.

Hope came in at six o'clock the following morning and Mary's foot and ankle were swollen. James said she was all right, nothing the matter with her and after talking over her case, James asked "What are you going to do about that? We had better call it off." Hope said we had gone too far, they will know it's a snake bite and she is going to talk. James asked, "What are we going to do with her?" and Hope said, leave it to him, he would take care of her. James again asked, "What are you going to do with her and Hope said, "She smokes a lot of cigarettes and lots

of people die by smoking in bed. I'll burn the house up." James said he kept taking a few drinks and finally got in his car and left about six o'clock. He said he was drunk and was trying to get sober. He ate breakfast and went to work at 8:45. About one o'clock Hope came into his shop and said, "Everything's all right." He and Hope had lunch and on the way back James asked him if he burned the house and Hope said no, he threw her in the bathtub and drowned her. James said, "You damned fool, that's the worst thing you could have done. I had a wife drown in a bathtub in Colorado Springs a little while ago." Hope didn't know that. James said, "Well, you really played hell, but it's too late now." James asked if he left her in the bathtub and Hope said no, he threw her in the fish pond. James said, "That won't stick. They will throw me in the jug when they find her. I'll be a good sport. You made a god-damned fool of yourself and me both, but I'll take the rap. There ain't enough men in the District Attorney's office to make me talk; and there wasn't, if he had not told it. You never would have got me to talk. So of [fol. 2693] course I arranged with this couple to go home with me."

James was asked if he killed his wife in Colorado, and he answered that he did not; or his nephew to whom he had been kind and helpful and who held a policy of insurance in which James was the beneficiary. The nephew was killed in San Francisco in an automobile accident at a time when James was living in Los Angeles and he could not have had any part in it. Hope was asked specific leading questions during the closing period of his alleged voluntary confession and his answers were in accordance with the leading form of the questions asked.

The purported confession which James claims he was forced to tell depicts a carnival of drunken debauchery. James said he was not beaten or struck in the presence of the District Attorney or his deputies, but when he was taken back to the private place of detention, without the hearing of any person save his accusers, he was beaten when he refused to answer, and also for refusals to give answers which were not acceptable to his questioners. Southard admitted that in the early stages of his confinement he refused to answer certain questions. In fact Southard said he told Mr. Fitts on one occasion to "go to hell". It is quite evident that he changed his mind after spending two

days in private detention and the balance of the time in the "High Power Tank".

The foregoing is an epitomization of the incoherent, contradictory, disconnected, incredible and irrational story which the prosecution introduced as the voluntary statement of James. It is fairly comparable to Hope's story.

We now come to the proceeding in which it is claimed that James admitted or affirmed the truth of Hope's story by failure or refusal to deny the same under the well-known rule that where one is directly charged with the commission of a crime, silence on his part or failure to deny the accusation may be received in evidence against him.

On May 2nd, at 11:45 a. m., the defendant was taken into the "Chaplain's" room at the county jail and Hope's confession or statement was read to him. Mr. Lynch, the statement reporter of the sheriff's office, reported the full proceeding. James was brought into the room by Officer Killion. Mr. Williams, Deputy District Attorney, was seated directly opposite James at a table about three and a half feet in width. Officers Southard, Griffen, Killion and Gray were seated across the table from James. Hope was also present. The reporter's notes do not show that the defendant was advised by anyone as to his rights and no showing was made that he was not under duress or as to what was done or said by way of inducement or fear of punishment immediately prior to the statement. Hope was present and the proceedings were begun by Mr. Williams asking the defendant the following question: "Q. James, do you know this man, Chuck Hope? A. Yes, I know him. Q. Now, Chuck Hope told us this morning that on the 4th day of August, the day before your wife was killed, etc. [Here follows two pages of a summarization of Hope's accusatory statement which was read to the defendant.]" At the conclusion of the statement Mr. Williams added: "He makes that statement. Have you got anything to add to it? By Mr. James: A. Nothing. Q. Nothing—that is all."

It certainly would require a reversal of the cardinal rules of criminal law that all inferences and presumptions and intendments of law are to be resolved in favor of innocence, to hold, in the face of James' experiences as shown by the record, that a failure of the accused to add to the accusations [fol. 2694] made by Hope should be taken as an implied admission of guilt. The defendant had been confronted with the accusations of Hope at every hour of the day and night

for several days and he refuted them until he finally yielded at the midnight supper. Would the average person have done otherwise than to have refused to attempt to add to Hope's story of monstrous deeds? In all fairness, should not James have been advised as to the legal effect of his failure to add anything to Hope's story.

It will be noted that the statement to Killion and Gray was not taken in stenographic form. Killion said he took it in shorthand, longhand and by "scribbling". It is in narrative form and bears no semblance to a stenographic report and is in the third person. When immediately taken before the district attorney no effort was made to advise the defendant of his rights. In fact it is admitted that he requested that one or both of his attorneys be communicated with. If either or both were not available at the particular time, it was sufficient notice to the prosecution that the defendant was asserting his statutory rights which could not be nullified by unduly hastening an inquisition not provided by law. It is always the duty of the law's representatives to give all reasonable assistance to the enforcement of an accused's statutory rights.

It may be noted that during the period of intense questioning which continued throughout several days, no statement reporter was present to report the methods by which the confession was attempted to be induced. It is the claim of the defense, and ample evidence supports the contention, that the alleged confession followed a long course of deprivation and physical mistreatment of a prisoner held incommunicado. It was only when the time was deemed ripe for a confession that a reporter was called to report the proceedings and in no instance were the preliminary things done and said, which caused or forced the alleged voluntary confession, made to appear as a part of the report. These important matters, so far as referred to at all, rest in parole. Neither was the defendant properly advised as to his rights or permitted to have independent advice or counsel at the times when the exercise of such rights would have been of benefit to him. The law casts the burden upon the prosecution to show that the confession of guilt was freely and voluntarily made without the exercise of duress, fear, force, or physical or mental cruelty, or hope of reward, or immunity from punishment. Notwithstanding the crime charged may be, as denominated by Lord Hale, the most de-

testable in nature, such as charged in the instant case, and loudly cries for the imposition of the extreme penalty of the law, if legally proved, the integrity of the law, founded on experience and enacted for the safety and protection of society and the individual alike, must, in all cases, be maintained by a compliance with the procedure prescribed by the sovereign will.

Facts and circumstances in an involuntary confession, when found to be true, are admissible. (People v. Castello, 194 Cal. 595.) The reason of the rule is that, inasmuch as the theory upon which involuntary confessions are excluded is their possible falsity, if the confession discloses incriminating facts which are shown to be true, the reason of the rule ceases to exist, and so much of the confession as discloses the facts and the facts disclosed are competent. Thus it may be proved that the defendant made an involuntary confession showing where stolen goods were concealed and that the goods were found there, but a further statement "I buried it there" is inadmissible, being part of an involun- [fol. 2695] tary confession. (People v. Murphy, 47 Cal. 103; People v. Hoy Ken, 34 Cal. 176; People v. Ah Ki, 20 Cal. 178.) The foregoing rule has no application to the instant case as every material fact herein is disputed and no physical fact, such as pointed out in People v. Castello, supra, and the other cited cases, exists in the instant case. Therefore, they are not applicable here.

It is true that several officers testified in terms of conclusions that no violence was inflicted upon the defendant or promises of immunity were made to him in their view or to their knowledge, but this does not meet the situation. Some were not called to testify and others may not have been present at the times physical punishment was used. From the record before us the conclusion is irresistible that unlawful means were employed by concert of action from the first to the time defendant made the alleged Killion statement to force a confession. The burden cast by law upon the People was not met. The case of People v. Dye, 119 Cal. App. 262, 269, 273, is directly in point here. Dye was convicted of murder of the second degree. The defendant, being suspected of murder, was taken into custody and confined in the Beverly Hills police station after the same fashion as the defendant here was held in custody by the officers at a private residence. Precisely the same kind of methods—

though by no means as extreme—were adopted there to coerce a confession from the defendant as were adopted in the instant case. Mr. Justice Conrey, then Presiding Justice of the Second Appellate District, Division One, District Court of Appeal, was the author of the opinion which reversed the judgment of conviction and the order denying a new trial.

In discussing the methods by which the confession was procured, the late Justice Conrey said in part: "It shows a persistent questioning of the defendant about various matters, many of which related to the tragedy * * * including a direct charge, which the defendant denied * * * During the night the defendant became weary and sleepy [in the instant case he became not only sleepy but fainted] but the questioning went right on. Officer Gray admitted that twice he told defendant 'to sit up in his chair'; that the defendant 'may have been nodding; he was not asleep'. In view of the inquisition that was going on, and the condition of the prisoner, these orders were in effect a kind of coercion. The circumstances of the questioning and the method thereof were well calculated to force a confession of guilt, but the process was not at that time successful. It was only after six hours more of questioning * * * followed by three days more of secret imprisonment that the confession was finally obtained. * * * Considering the wearing-out process of inquisition, the secrecy of the imprisonment, the isolation of the defendant and the unlawful failure to take the defendant before the magistrate (Pen. Code, secs. 821, 824, 849 and 145) the transaction has all the earmarks of a deliberate attempt to force a confession by every means short of promises, direct threats or actual violence. [In the case at bar a direct act of violence in at least one instance is admitted. As to others the evidence is quite convincing.]"

After discussing the fundamental rules governing the voluntary character of confessions, the decision turns to the claim that the confession having been made a few days after the effect of improper methods had ceased to operate on the defendant's mind, the evidence thereby became admissible. The decision continues: "It is also true that if threats and inducements are made to a prisoner, and within a few days thereafter he makes a confession, such acknowl- [fol. 2696] edgment of the commission of the crime may not be introduced in evidence unless it clearly appears that the

threats and inducements had ceased to operate upon his mind to bring about his statement of his own guilt." (Citing a number of decisions of our own and appellate court decisions.)

The following pertinent paragraph concludes the discussion: " 'The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. "It is an essential [part] of justice that the question of guilt or innocence shall be determined by an orderly [legal] procedure, in which the substantial rights belonging to defendants shall be respected." (Opinion written by Mr. Justice Sloss in People v. O'Bryan, 165 Cal. 55 [130 Pac. 1042.])' (People v. Wilson, 23 Cal. App. 513, 524 [138 Pac. 971, 975].)"

Article VI, section 4½, State Constitution, has no remedial application to the case. Without the alleged confession, Hope being an accomplice, his testimony stands uncorroborated unless there is other evidence which tends to connect James with the commission of the offense. (Sec. 1111, Pen. Code.) This court will not attempt to speculate as to which one, as between James and Hope, a jury would credit or, if it should credit Hope, whether it would find sufficient corroboration in "such other evidence" as would tend to connect James with the commission of an offense carrying with it the death penalty. (Section 1111, Pen. Code.) This would be to speculate solely as to what a jury might do in the consideration of an entirely different state of facts.

The defendant at the outset, and as soon as official pressure was removed, entered his plea of not guilty and protested his innocence as against suspicious circumstances which may have been the fortuitous or unaccountable acts of chance, or may have been the brood of a wicked and designing mind. Indisputably a financial advantage accrued to James by the death of his wife. He was the beneficiary named in the policies of both wives. Both died from drowning. The death of the first was not confused with any considerable number of theories. The death of the second would indicate, if the prosecution's theories are sound, that the perpetrators of the crime became distraught with a strange, fiendish obsession for indulgences in absurd, unusual and unnatural ways, as weird in phantastic conception as the boiling cauldron's "hellish brew" about which

witches danced in frenzied glee as they foretold the unhappy doom of Macbeth, and were not ruled by the normal and natural and less involved ways, in order to profit by the death of another.

It would add nothing to the strength of the prosecution's case to review the great mass of testimony given by the defendant on direct and cross-examination. It will suffice to say that he denied categorically and in detail Hope's rattlesnake stories and every incriminating charge and testified that no rattlesnake was ever on his premises of which he had knowledge. Eliminating the story of Hope, a self-insistent accomplice, and the purported confession of James from the case, there is no person left who claims to have ever seen rattlesnakes in James' garage or on his premises. Hope testified that he had rattlesnakes in his garage in a glass-faced box and another box one foot and a half in length and a foot wide for almost a month. James had occasional visitors and the entrance to his yard was usually through the [fol. 2697] back way into the garage. Mrs. Murphy, James' sister, a mature woman and a telephone operator, who was at his home for two or three weeks and was helping him doctor chickens for the roup when Hope entered James' premises for the first time and addressed James as "Doctor", testified she never saw or heard of a rattlesnake being on the premises. Mike Allman, a reptile showman, is the only other witness who gave any testimony on the subject. His testimony has been set out herein and it is absolutely self-nullifying, contradictory and so uncertain that no court would accept it as sufficient to establish the identity of a man on trial for his life, or even to create a serious suspicion that the identifying witness himself was serious as to his ability to identify the person in question. Three snake men testified they bought from and sold Hope snakes. None knew James in any snake transaction. Hope sold some of the snakes and he said he deliberately threw two of them into the highway. He told the sellers he wanted "fighters"; he wanted to pit them against dogs and game cocks—to win back money he had lost playing poker.

James related his marital relations with his wife and the happy circumstances in which they lived, which was corroborated by the testimony of their close friends, Mr. and Mrs. Pemberton. The testimony of his employees and all persons in a position to know of their relations is that he treated his wife affectionately at all times. Her last letter

to her sister telling her of her sickness assures her sister that she is kindly treated. He testified to his wife's pregnancy and her tendencies to nausea and the many symptoms which attend maternity. He described his leaving home Monday morning at the usual hour. His wife had not had a good night and he advised her to remain in bed all day. He took his breakfast down town to avoid the odor of food in the house. Hope was at the house. Hope later 'phoned to him from down town and told him his wife wanted him to bring home some cottage cheese. James also told how his wife was attired when he left on the morning of August 5th, which corresponded with the attire worn by the blonde woman whom Dr. Alfred Dinsley, a neighbor, saw come out of James' chicken house and stand some twenty-five feet from him, while the dog was barking at him, on the morning of August 5th at 9:25 o'clock.

After unsuccessful negotiations with the insurance company, James told the agent of the company that he was going to sue the company for the insurance money and the agent said the company did not think he would sue because the coroner's jury didn't completely exonerate him of his wife's death, and it felt that a murder charge should be placed against him if he sued. James replied: "I am going to sue them and I will do it if they break my neck." He did file suit.

The inadmissibility of the confession may be placed entirely upon the testimony of the witnesses relied upon by the prosecution.

James testified on the trial as to the ordeal to which he claimed he was subjected before the confession was made to Killion and Gray, and shortly thereafter to the district attorney and the officers in the rooms of the district attorney's office. He said he had been questioned for hours by the district attorney and the officers before he was taken to the restaurant. This is admitted. He said he was made sick and weak. His testimony is that he had told the prosecuting officer time after time that he didn't know anything about Hope's story and about eleven o'clock, after hours of questioning, the district attorney said: "You have heard the story over and over and we are going to clean it up and you had just as well tell me now, because we will be sitting [fol. 2698] here until Monday morning." He said he still persisted that he didn't know anything about the story; that he had never heard of rattlesnakes; that he didn't

understand the story. At twelve o'clock midnight all the officers—some fifteen or twenty of them had been there all evening—cleared the room and sent Jack Southard in to talk to him. Southard told him what he was going to do if he didn't admit the things they wanted him to admit. He said he didn't know the story. He had heard the officers repeat it over many times. When they told him they were going to take him back to the private house and what they were going to do to him—that he had been lying all evening to Fitts—he told them if they wouldn't do it he would try to tell the story as he had heard it. When he tried to tell the story and got "off the story" or omitted to include some portion of it, one of the officers would prompt him by saying, "Didn't this or that happen", and in every instance he accepted their suggestion. The report on the long examination conducted by District Attorney Fitts, from 1:30 in the morning to 2:30 or 3 o'clock, shows that Killion, Gray and Griffen were present and quite often prompted James in relating the restaurant story already referred to. The questioning on this day began at the district attorney's office at two o'clock p. m., May 2nd, and lasted until three o'clock the next morning. On that day he was taken out of his tank and driven to his Verdugo home in company with two or three investigators where he was later met by others. This is admitted. What followed has been told.

District Attorney Fitts did not take the witness chair. It was stipulated that he would testify substantially as Deputy District Attorney Stewart had testified. Mr. Stewart's testimony was brief. He testified that no threats, inducements or promises were made or violence used in his presence or to his knowledge, except the Southard slapping episode. Neither was present at all times during the long hours that the officers were attempting to force a confession. He, as did other officers, testified to the calm, cool and self-possessed demeanor of the defendant at the times he was present. Also that James requested that he be given something to eat just before being taken to the restaurant.

James testified at great length at the trial and we will not attempt to make a complete resume of his testimony. He denied the rattlesnake story and all evidence given by Hope and the officers which tended to connect him with the death of his wife, including the testimony of Madge Reed, which has been sufficiently discussed. His dealings with the

insurance companies, which were openly made with the several agents, have been set forth by the prosecution's witnesses and it is not necessary to again refer to them. Every incriminating fact and circumstance which was brought to his attention was denied. We will briefly refer to his testimony, which is corroborated in several important matters by Mrs. Murphy, who was at his home within a few days of the death of Mrs. James, and by other witnesses. She was in the garage and the back yard much of her time working with the chickens. She saw no snakes.

James testified that Hope came to his shop Saturday, August 3rd, at ten or eleven o'clock. Saturday was a very busy day in the barbershop. He told James he had lost his job and wanted to go to Long Beach to cash his pay-check. Hope borrowed James' car and went away. While he was gone he filled a prescription, written by the attending physician, which James gave him to have filled for his wife. [fol. 2699] At 5:30 he came in the shop and handed James his keys. The next morning, Sunday, at eleven a. m., he came to James' house. He told James he had come to perform an abortion on his wife. James said to him his wife told him about Friday night and he didn't want Hope to tell him anything about it. James said he begged his wife not to submit to an abortion. He wanted her to go to the hospital where he was regularly paying a hospital tuition. She refused to go to the hospital. He told Hope an operation was against his will. James said he had left his earnings in the cash drawer and he drove to Los Angeles to get them. Hope was at the house when he left. He returned at one o'clock and Hope left in James' car. He was to return it that night, but he did not come back until 6:30 Monday morning. James was angered at Hope, and Hope admitted he upbraided him for keeping his car all night. Mrs. James was restless during the night and James left home at the usual hour without breakfast and advised Mrs. James to remain in bed. She said she was as comfortable up as in bed. The Jameses were to dine with the Pembertons that evening, but Mrs. James was not in condition to go and it was arranged that the Pembertons were to dine with the James with the result already told.

Several persons were in the immediate vicinity of the fish pond about nine o'clock on the morning of August 5th, but no one saw her body on the yard walk. Mr. W. D. Mc-

Gregor had an appointment with the next door neighbor, Mrs. Pauline Cruickshank, and by mistake entered the James' premises. He rang the James' door bell three or four times, picked up a note and stuck it in the door, and walked about the premises quite a while, but did not see Mrs. James' body. Mrs. Cruickshank was in her yard next door from eight to nine o'clock in the morning but nothing unusual attracted her attention. She said her vision was cut off from the particular locality. The testimony of Dr. Dinsley, who saw the woman described by him on the James premises, did not see Mrs. James' body on the cement walk. The testimony as to the place where Mrs. James' body lay, being more or less hidden from view at certain points, was a disputed matter. Some of the witnesses testified that if Mrs. James' body was at the place described, it would have been visible from almost any point of the yard. Others contended that the shrubbery would have hidden it from view at given points. It is Hope's story that her body lay in the front yard on the sidewalk, from about 6:30 or seven o'clock in the morning until eight o'clock in the evening. If his testimony is true, the weight of probability is that it would have been seen by some one of the several persons who were on and near the premises.

James said he introduced Hope at the breakfast table on Sunday morning, at which Mrs. Murphy, Lois Wright, Hope and himself were present, as Dr. Smith. He said he did so at Hope's request, as Hope said he was keeping his identity concealed inasmuch as he was having trouble with an alimony proceeding. James testified that Hope had told him that he had been, for some time, a medical student and had worked with "dope". On cross-examination James said before he left his home on the morning of August 5th, Mrs. James said she wanted to see Hope and he and Hope went into the house and she told Hope she "had not menstruated yet" and he said "she would and he would stay there with her".

The attorneys for the defendant on motion for new trial, in addition to numerous assignments of error, including erroneous rulings on the admissibility of evidence and the giving or refusing to give requested instructions, filed affi- [fol. 2700] davits setting forth irregularities of the trial which they averred were highly prejudicial and deprived the defendant of a fair trial. While some of the assignments as

to erroneous rulings on matters of evidence are not without merit, we deem it unnecessary to consider each assignment specifically. We are of the view that the rulings against the defendant were in several instances too narrowly restricted. That said investigators, and particularly Officer Southard, were not only adverse witnesses, but were positively hostile to the defendant, incontrovertibly appears from the record. Rulings in such a case as this one should be liberal to the end that the motives, purposes and good faith of the parties may be subjected to a most searching examination.

Counsel for the defense complain as to misconduct on the part of counsel for the People as to their arguments to the jury in assuming facts as actually proved, which were highly controversial matters, and also as to the vehement and scathing manner in which the defendant was arraigned as to matters which were not germane to the main issue. It is not necessary to devote time to other assignments in view of the major errors which in our opinion compel a reversal of the case.

The affidavits of R. E. Parsons and Wm. J. Clark, Esqs., defendant's attorneys, aver various acts of misconduct. They are predicated in the main on the dramatic manner in which two live rattlesnakes were brought into the courtroom in a glass-covered box some five feet in length and placed in front of the jury. The snakes as carried down the aisle shook their rattles furiously. It is not necessary to describe the consternation into which the crowded courtroom was thrown. There are some things of which the court will take judicial notice and this is one. The inside of the box contained smears of venom where the snakes had struck the sides of the box. This was called to the attention of the jury. The averments are that spectators rose to their feet, some gasped from nervous fear and persons nearest the aisles shrank away. Many uttered audible exclamations of fright. Counsel incorporates in his affidavit as descriptive of the scene the following account taken from the Los Angeles Herald-Express, a newspaper of large circulation:

" 'Buzzing their hollow rattles so loudly that women in the crowded courtroom shivered and shuddered at the eerie, frightening sounds, two diamond-back rattlesnakes glittering in their new skins today were placed on the counsel table in Superior Charles W. Fricke's court, where Robert

S. James, Birmingham barber, crouched ghost-faced and jittery at his trial for the murder of his golden-haired bride, Mary.

"'Paraded across the courtroom in a velvet covered venom-splashed, 5-foot glass cage, two deadly diamond-back rattlesnakes late today hissed and shook their hollow rattles eerily, and struck out with their evil wedge-shaped heads, as they were exhibited less than 2 feet away, before the fascinated eyes of 10 men and 2 women who make up the jury trying Robert S. James for the murder of his golden haired wife, Mary'."

The Los Angeles Examiner, another newspaper of wide circulation in Los Angeles, made the following comment:

"'Men's enemy from primordial ages, the snake, yesterday was made the living, visible symbol of the Robert James murder case. Two diamond-backed rattlesnakes hissed and struck before the trial jury as a long glass box was borne forward like a hideous offering of a black ritual'."

Affiants have also incorporated in their affidavits various excerpts which purportedly express the prejudice aroused [fol. 2701] in the minds of named jurors against the defendant by the exhibition of the snakes. This, we cannot consider for obvious reasons.

Appellant further complains that the jury was permitted to go at large and mingle freely with the general public, which harbored a strong feeling of prejudice against the defendant before the trial was commenced, and affiant seriously considered making a motion for a change of venue. When the jury was selected affiant suggested to the trial judge that the jury be placed in the hands of the sheriff but the request was not granted. This was a matter within the discretion of the court. The jury was admonished by the learned trial judge on each adjournment not to read any comments made as to the guilt or innocence of the defendant and not to be influenced by anything whatsoever but the evidence and instructions in arriving at their verdict. Be this as it may, it is the contention of appellant that the metropolitan newspapers, before and during the trial, daily printed sensational and prejudicial articles which were circulated in the streets by news-criers and at newsstands which painted the defendant in such hideous colors, to which were added daily adverse comments and overheard street

condemnations, as to make it improbable, if not impossible, for an average person to have calmly and dispassionately withstood withering onslaught and considered the evidence uninfluenced by the hostile opinion of an overwrought and frenzied public, which was unquestionably communicated to the jury in every form of modern news transmission.

It is further averred that an article signed by Scott Littleton, staff investigator for the district attorney's office, was published in a nationally known magazine which was widely circulated in Los Angeles during the trial of the case, purporting to give in detail the methods by which the confession was obtained and matters which did not appear in evidence, all of which were highly prejudicial to defendant. If true, said article is conclusive evidence of the illegal methods employed in obtaining the alleged confession. Said article also contains information which would materially aid the defendant in another trial in breaking down the contention of the prosecution. It is also averred that Madge Reed, whose attempt to extort money from James appears in evidence and who admitted that she gave him the impression that she was ready to commit perjury for money to aid him in his defense if he was prosecuted, has since written letters to the insurance company contesting payment of a policy issued on the life of Mrs. James, and also to the investigators, which have lately come to the knowledge of the defense and which are wholly inconsistent with and at variance with her testimony given at the trial.

By what has been said in considering the case we are not to be understood as vindicating James or in any way absolving him of any criminal connection he may be shown to have had with his wife's death in conformity with the rules of law. Our concern in the matter is that the rights and guarantees which the Constitution and statutes vouchsafe to every person accused of crime shall be fully accorded such person in the form and in the manner provided by the rules which wisdom and long experience have formulated as affording the best and surest protection against criminal acts which the human mind has been able to devise without encroaching on the right to enjoy life and liberty unless, adjudged by the fundamental rules of law under which we have long existed, such citizen or individual has forfeited his rights to the one or the other. The physical conse- [fol. 2702] quences that may befall James, or any indi-

vidual, is not more important to the welfare of state than the uniform application of the law to all cases in which human life and liberty are involved.

Some of the major grounds on which I base my dissent are as follows:

1. The inherent improbability of Hope's rattlesnake story.

2. There is no sufficient corroboration of the testimony of Hope that James ever saw any rattlesnakes on his premises or elsewhere.

3. The uncontradicted testimony of the witness, Dinsley, that he saw a women, who could have been none other than Mrs. James, in her chicken yard, hours after Hope said she was dead. This testimony is corroborated by the fact that several persons were within the James' dooryard at about nine o'clock in the morning and nobody saw her body on the cement walk.

4. The letter found written by Mrs. James to her sister on the morning of August 5th is persuasive evidence that it was written during the daytime of that day and long after the hour that Hope said she had died.

5. There is an abundance of testimony that an abortion was attempted and that Hope permitted himself to be known as "Dr. Hope".

6. The abortion story is further corroborated by the dilemma in which Hope found himself and, according to his own statement, he advised James to take Mrs. James to a hospital. That the person whom they were attempting to kill should be taken by them to a hospital to be restored to health is too absurd to require comment.

7. The testimony of Hope to the effect that Mrs. James was in a sodden state of intoxication at the time of her death is rebutted by the chemical analysis made of her stomach which showed that it contained no alcohol. Serious contradiction and inconsistencies appear in the record which make the testimony of Hope extremely doubtful in many respects.

What has been said by way of disagreement with the main opinion is not to be understood as an imputation that

the officers who participated in the prosecution of James did not believe that he was guilty of the crime charged. The case, as a matter of fact, is so mixed with horrifying incidents as to create a prejudice against the person so charged, which may, unwittingly, influence the judgment of partisans to accept surmises and suspicions and conjectures as proof of substantial facts which they fall short of supporting. The zeal of the officers in an effort to convict has led them far beyond the boundary lines prescribed by the Constitution and the statutes, which cannot be justified on the grounds that the end justified the means. Other grounds compelling a retrial have been heretofore considered.

In my opinion a new trial should be granted.

Seawell, J.

I concur: Curtis, J.

[fol. 2703] IN SUPREME COURT OF CALIFORNIA

OPINION ON REHEARING

By the Court

This cause is before this court on rehearing. In the former opinion (People v. Lisenba, 97 Cal. Dec. 378) every point then raised by appellant was discussed. On further consideration of this appeal, we are of the opinion that the proper conclusions were reached in said former opinion on all points then raised. We therefore adopt said opinion as a part of this opinion upon rehearing. Said former opinion follows:

"In an indictment returned by the grand jury of Los Angeles county. Major Raymond Lisenba (also known as Robert S. James and who will be referred to as the defendant), and one Charles H. Hope were jointly charged with the murder of Mary Emma James, defendant's wife. The alleged homicide was perpetrated on or about August 5, 1935, and remained undetected for a period of several months. In fact, the indictment was not returned until May 6, 1936. Thereafter, the accomplice Hope entered a plea of guilty to the charge and at the time of defendant's trial was awaiting sentence. He has been since sentenced to life imprisonment. Hope was the principal witness for the prosecution upon the defendant's trial, at which trial it was the theory of the People that defendant, in league with Hope, had plotted and

consummated the death of defendant's wife for the purpose of collecting and dividing the proceeds of certain insurance policies on her life. It was also the theory of the prosecution that the homicide was perpetrated in such manner as to give the appearance of accidental death not only to allay suspicion but in order to bring into operation the double indemnity provisions of the insurance policies. In this connection, the evidence of the prosecution tends to establish that the conspirators undertook to bring about the deceased's death by means of a deliberately inflicted poisonous rattlesnake bite on the under side of deceased's left foot (the assumption probably being that, if fatal, such bite or laceration would appear to have been incurred in or about the garden of her home) and that this ingenious method of destruction having proved ineffective the conspirators accomplished their objective by deliberately drowning the deceased in the bathtub of her home, whereupon her body was placed in the fish pond on the premises to further the 'accidental' appearance of her demise. The methods assertedly employed to bring about the deceased's untimely death will hereinafter be more fully described upon a detailed recitation of certain of the evidence. Upon the conclusion of defendant's trial, a verdict was returned finding him guilty of murder in the first degree, without recommendation. This appeal is from the judgment imposing the extreme penalty and from the order denying a new trial. We [fol. 2704] turn now to a discussion of pertinent evidence in the case.

"Viola and James Pemberton, husband and wife, when called by the prosecution, testified, in substance, that they had accompanied the defendant to his home on the evening of August 5, 1935, where they were to take dinner with the deceased and defendant; that upon arrival there they failed to find the decedent in the house whereupon defendant procured flashlights and suggested a search of the grounds and garden; that the defendant went to the back and James Pemberton to the front of the premises; that as the witness James Pemberton walked back through the shrubbery he saw the body of the deceased in and near the fish pond, with the upper part of the body and head (face down) submerged in the water; and that when the defendant was told of the gruesome discovery he cried and otherwise expressed his grief.

"John P. Toohey, a deputy sheriff, testified that he, in company with another deputy and in response to a summons, appeared at the scene at approximately 8:30 p. m., at which time he saw the body of the deceased near the fish pond; that at the time the head was in the water, face up (the discoverers undoubtedly having previously moved it); that the water was approximately 14 inches in depth; and that the body was so placed that he could see that the left leg 'was swelled and very blue'.

"A. L. Hutchinson, also a deputy sheriff, testified that when he arrived at the scene he 'noticed a cut on her [deceased's] left toe, her big toe on the left foot'; that the flesh of her left leg 'was very dark * * * and it was almost black between the ankle and the knee, very black'; that the 'whole [left] leg was black and blue from the ankle up to the knee and on the inside of the leg' and was 'some swollen'.

"Charles H. Hope, the defendant's confessed accomplice and who at the time was awaiting sentence upon his plea of guilty to the charge of murder, testified, as the state's principal witness, that he had known the defendant for approximately seven years; that when conversing with the defendant in the latter's barber shop in June, 1935, the defendant asked him if he had any knowledge of rattlesnakes, to which the witness answered in the negative; that the defendant thereupon stated that he had a friend who had a wife he wanted to kill and desired rattlesnakes for the purpose, adding that if he (Hope) would 'get me some rattlesnakes, I will give you $100' and 'defray all expenses'; that subsequently he (Hope) bought three rattlesnakes in Long Beach and delivered them a few evenings later to the defendant at his home; that the snakes cost $5 but the defendant paid him $20 prior to their delivery; that the defendant then had him stay at his (defendant's) home for several days and while there had the witness go to town and have two boxes made for the snakes with sliding glass tops; that the boxes were approximately two feet long and nine inches high; that in July, 1935, he again talked with the defendant at his barber shop at which time the defendant said his friend was dissatisfied with the snakes because they were not fighters and that fighters could be procured at the Ocean Park Snake Pit; that thereafter he went with the defendant to said snake pit where the defendant conversed with the attendant and said 'that is the one I want'; that the following day the defendant sent him to purchase the snake so

designated; that the purchase was made and the snake was delivered to the defendant; that he next saw the defendant on August 3, 1935, two days prior to the homicide, at which [fol. 2705] time the defendant said that the snake was no good and that he wanted some fighters; that he (the witness) thereupon went to 'Snake Joe' at Pasadena and purchased two snakes which he delivered to the defendant; that the defendant said 'his wife [the deceased] had $5000 worth of insurance and he was going to collect it'; that he went to the defendant's home on August 4, 1935, the day preceding the homicide, at which time the defendant stated that the witness was in as deep as the defendant; that defendant had him bring one of the sliding glass top boxes containing a snake from the garage into the house; that he came in the back way to the kitchen at which time he observed the deceased in her nightgown strapped or tied to the kitchen table and with adhesive tape, previously purchased by the witness at the defendant's request, fastened over her eyes and mouth; that the defendant told him he got the deceased, who was then pregnant, on the table under a ruse that a doctor was coming to 'perform some kind of an operation on her for pregnancy'; that while the deceased remained in this prostrate position the defendant put her left foot into the box containing the snake; that the witness then returned the box to the garage; that he later left in the defendant's car with the box containing the snakes and dead chickens, etc., which had fallen prey to the snakes in defendant's prior tests of their ability to destroy; that he then picked up his (the witness') wife at her place of employment and returned the snakes to 'Snake Joe' from whom they had been procured; that he threw the boxes out along the road; that he returned to the defendant's home about 1:30 a. m., August 5, 1935, the day of the homicide; that the defendant then appeared to have been drinking and told the witness that the snakes were no good and that his wife was not even sick; that the defendant thereupon jumped up and said, 'I am going in and drown her'; that the witness stayed in the automobile; that the defendant came out about 4:00 p. m. and said, 'That is that'; that at approximately 6:30 or 7:00 a. m., the defendant said the deceased had been dead since 4:00 a. m. and the house 'cleaned up'; that defendant then asked him to 'help me carry it' whereupon he accompanied the defendant into the house where he observed the deceased lying in the hall dead with her feet toward the bath-

room; that the defendant took the upper part of deceased's body and the witness the lower part and carried her 'towards the fish pond'; that the witness refused to put deceased in the fish pond as requested by the defendant but went instead to the automobile; that the defendant told him he would care for him 'when I get this money'; and that some time later the defendant gave him $100 and instructed him to 'get out of town'. The witness thereupon identified three persons in the courtroom as the three men from whom on separate occasions he had purchased the snakes as above mentioned. His story was not materially shaken on cross-examination.

"Certain portions of Hope's testimony were corroborated by his wife who, among other things, testified that on August 3, 1935, she drove with Hope to a snake farm in Pasadena; that Hope took a box and went to the side of the barn where she saw him with 'Snake Joe', whom she identified when he arose in court; that the following morning she drove with Hope to within a block of defendant's home and Hope left her there, the witness driving back to Los Angeles alone; that Hope picked her up at work about 2:00 p. m. of that day (August 4th) in the defendant's car; that there were boxes in the back of the car; that they again drove out to [fol. 2706] the snake farm in Pasadena; that Hope took a box and went inside, returning several minutes later with 'Snake Joe'; that on the return trip Hope threw out two boxes with glass tops; that Hope left her after dinner and she did not see him again until the following morning (the morning of the homicide) when he appeared 'white and jittery and had been drinking.'

"Additional corroboration of portions of Hope's story appears in the testimony of the three persons from whom he assertedly purchased the several snakes. Roland H. Kirby testified that early in July, 1935, Hope came to him and said he was interested in experimental work and inquired if he had snakes 'with fangs and poison'; that Hope purchased three snakes and the witness gave him a jar of crystallized rattlesnake venom.

"Mike Allman, who operated a reptile show at Long Beach, testified that the defendant and Hope one day came to his snake pit; that they had been drinking and were noisy; that the defendant offered to bet that the witness had no poisonous snakes; that the following day Hope returned with a sliding glass top box and purchased a rattlesnake,

stating that he had lost $100 to the defendant in a poker game and the defendant had offered to bet him $50 that the witness had no poisonous snakes; and that upon being assured that a certain snake was poisonous, Hope purchased it to recoup a part of his card loss to the defendant. On redirect examination the witness stated that some time later and after their arrest, he had identified and picked out the defendant and Hope from a crowd of persons.

"Joe Houtenbrink, known as 'Snake Joe', testified that he operated a snake farm in Pasadena; that Hope came there on August 3, 1935 (two days prior to the homicide) and purchased two Diamond Back or Crotalus Atrox rattlesnakes for which he paid $3.00; that Hope said he had a friend and 'he said he already bought some snakes from other places and they wasn't hot and he wanted a real hot one and he was told to come over to me to get the snakes, that I handled hot snakes'; that Hope explained he wanted the snakes to bite and kill a dog and thus win a bet; that Hope had a box with a glass cover on top for the snakes; that he saw Hope the following day about 3:00 p. m. (the day preceding the homicide) and that at that time he repurchased the snakes from him for half price. This testimony corroborates that of Hope and his wife.

[1] "At this point in the trial argument arose between counsel over the prosecution's proposal to bring into court the two snakes purchased by Hope from the preceding witness and which the district attorney declared were 'the actual snakes that were at the house that day'. Defense counsel vigorously opposed their production in court but the objection was overruled. The two snakes were thereupon produced in court confined in boxes. Defense counsel then insisted that the record show that the courtroom was assertedly thrown into a state of excitement and consternation by the production of the two snakes. However, in opposition to counsel's assertion, the record also discloses the statement of the trial judge that the decorum of the courtroom and the orderly conduct of the trial were not disturbed in any manner by the incident. Thereupon, 'Snake Joe', still on the stand, identified the two snakes so produced as the two he had sold to Hope two days prior to deceased's death and had repurchased from him one day prior thereto. According to Hope's testimony, at least one of the two snakes so identified, was employed by de-

fendant and him to inflict a poisonous bite on the deceased's left foot when it was pushed by the defendant into the box [fol. 2707] containing the reptile. In view of such identification of the snakes and their employment in the plan to bring about the death of deceased, we perceive no error in the trial court's ruling permitting the production of the snakes for the inspection of the jury. It is not uncommon upon a murder trial to offer in evidence as part of the res gestae the medium employed to bring about the violent or untimely death of the victim. In People v. Bannon, 59 Cal. App. 50, 56, it is stated that 'As a general rule physical objects which constitute a part of the transaction, or which serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under judicial investigation.' (See, also, People v. Peete, 54 Cal. App. 333, 348, and 8 Cal. Jur. 143, sec. 228.) Moreover, the production of the identical snakes tended to corroborate the testimony of prosecution witnesses and to otherwise support the case of the People. It might also be mentioned that if the production of the snakes in court caused the extreme state of excitation urged by the defense, it is difficult to appreciate why defense counsel at a later time in the trial and during the development of the case by the defense, again produced the snakes and thus risked a repetition of the situation of which complaint is here made.

"Returning to our discussion of the evidence, we find that the witness Irving Sherman, called by the People, testified to the effect that his father was in the cabinet business and that Hope on July 28, 1935 (several days prior to the homicide) ordered and had made two boxes with sliding glass tops. This item of evidence lends some credence to portions of Hope's testimony as well as to that of other prosecution witnesses.

"In support of Hope's testimony that he was with the defendant at his shop and at his home several times prior to the homicide, thus affording opportunity for the planning and carrying out of their scheme, there is the testimony of Lois Wright, the defendant's niece, that she had seen Hope at defendant's barber shop, where she worked, and also had seen him in July, 1935, at defendant's home.

"Sam Grant, a barber in defendant's shop, also placed Hope there on many occasions in 1935.

"Dr. A. F. Wagner, the autopsy surgeon, testified that he found a laceration on the surface of deceased's great

left toe; that her left foot was considerably swollen and discolored, the swelling extending up to the hip; and that deceased's lungs contained a considerable amount of water. He gave as the cause of death, 'drowning and an acute cellulitis [swelling] of the legs.' Cellulitis, he testified, is 'always due to an infection of some kind'; that cellulitis resulting from a bacterial infection would take from two or three days to a week to reach the extent it had in the deceased but that if caused by 'animal poisons' it would progress 'much faster'. He elaborated to the extent of saying that animal poisons capable of producing cellulitis such as the deceased had would be 'the venoms of insects and snakes, spiders, and so forth'. He further testified that the cellulitis present in deceased was not of the bacteriological type but was of the 'animal poison' type and 'could have been' caused by the bite of a snake. In addition, he testified that he again had examined the deceased's body in May, 1936, following its disinterment when criminal proceedings appeared in order, and that he was of the opinion that the laceration on the deceased's toe was caused by a rattlesnake bite.

"Dr. Gustave Boehme, who was present at the examination following deceased's disinterment, testified that he had [fol. 2708] made a special study of snakes and snakebites; that on deceased's great toe of the left foot he had discovered an 'old laceration wound approximately a quarter of an inch in length' which could have been caused by a number of things but, in his opinion, had been caused 'by some venomous creature, probably a snake, and all the other findings on the leg were compatible with such a finding', adding that the single incision was such 'as could be caused by a fang striking at an angle, perhaps'. In his brief the defendant concedes that this testimony is corroborative of Hope's story.

"Mrs. Ethel Smith, another niece of the defendant, testified, among other things, that the defendant had sent a trunk to her home for storage and that certain rope shown to her was in the trunk. Charles Griffen, an investigator for the district attorney, testified that he found the rope in the trunk. The significance of the testimony of these two witnesses lies in the fact that Hope when on the stand had previously identified the rope as being similar to that with which the deceased had been tied to the table when her foot was placed in the box containing the snake.

"In support of its claim that the motive underlying the deceased's untimely death was the collection of insurance moneys, the prosecution produced as a witness one Louis Berry, an insurance agent with the Mutual Life Insurance Company, who testified that he had been a customer at defendant's barber shop and had solicited him for life insurance; that defendant said he was not personally interested but knew a girl who might be interested in life insurance; that about two weeks later defendant inquired as to the cost of a $5000, twenty or twenty-five year endowment policy on a girl 26 years of age, whose name he would not reveal; that defendant agreed to submit the matter to the prospect; that about one week later the defendant introduced the witness to the prospective client, Mary E. Busch, who later became the defendant's wife and for whose murder he now stands convicted; that on June 25, 1935, he delivered to her a $5000 policy which named the defendant as beneficiary, that subsequently and on July 30th, he called on the defendant in response to the latter's telephone request and the defendant inquired as to the effect on the policy of a misrepresentation by the insured at the time of applying therefor that she was married, when, in fact, she was not (deceased and defendant had been living together at the time); that the defendant stated they were not married until July 19th, following the issuance of the policy; that he (the witness) checked the matter with the company and reported back to the defendant that the policy was not affected thereby; that one premium was paid on the policy; and that after the deceased's death the defendant inquired if the company would pay under the double indemnity provisions of the policy as a result of the accidental character of her death. On cross-examination the witness testified that the defendant had procured other prospective clients for him.

"Max Galatz, a representative of the Occidental Life Insurance Company, testified that late in May, 1935, he received two applications for insurance on the life of the deceased, one for a $5000 policy and the other for a $700 policy; that defendant was named beneficiary in both; that the defendant and deceased (contrary to the fact) said they were husband and wife at the time; that he told the defendant that he would have to have more insurance on his life than the deceased had on hers; that defendant said he had ample insurance in two or three companies but applied for [fol. 2709] a $3000 policy on himself; that the policies were

issued and delivered about June 12th; and that only one premium was paid by the defendant on each of said policies, including his own. On cross-examination, the witness stated that in litigation which followed on the policies after deceased's death the defendant claimed under the double indemnity provisions but later settled for $3500, which amount (less than the face value of the policies) was paid to the defendant. Defendant's testimony given during the trial of such action was read into this record by the phonographic reporter, from which it appeared that the defendant met the deceased about March 1, 1935; that they began living together early in May, 1935; that defendant, unknown to the deceased, had arranged for a mock marriage inasmuch as he could not then legally marry deceased because of the pendency of an annulment proceeding growing out of a previous marriage; that they thereafter became legally married on July 19, 1935; and that the deceased was in 'marvelous health' up to the time of her death. In connection with the two policies last above mentioned, the defendant two or three weeks prior to deceased's death likewise made inquiry as to the effect of the misrepresentation that the parties were married at the time of making application therefor.

"E. L. Taggart, an automobile salesman, testified that he met the defendant early in 1935 and that defendant then stated that he desired to buy a cheap car with the understanding that he could turn it in on a large Studebaker in a few months upon his receipt of $10,000 from an 'estate'.

[2] "Madge Reed testified, in substance, that she met the defendant in the Italian Village on July 10, 1935; that he stated he was visiting from Kansas and was staying with his sister; that the defendant became intoxicated and asked her to drive him home, which she did; that while she was at his home, a woman who identified herself as his wife (the deceased) came home unexpectedly from a convention; that the defendant telephoned her several times thereafter, including a call two days prior to the deceased's demise; that defendant visited her at her apartment on August 11th (six days after deceased had died) and stated that they were trying to frame him for his wife's death but that he would collect her insurance money, marry the witness and they would go north; that defendant stated in the event of his indictment he wanted to use the witness as a surprise witness

and would give her $2,000 if she would testify that she had met the defendant and deceased five weeks previously; that on the morning of deceased's death the witness had seen the deceased on her porch and that deceased had then complained of not feeling well, making particular mention of a sore leg; that she (the witness) and defendant registered that night at a hotel and talked over his troubles and the asserted attempt to frame him; that defendant had her make notes on a card as to how he wanted her to testify (briefly outlined above), whereupon the witness identified the card on which she had written the notes and also the hotel register. She further testified that defendant gave her $60 at that time and promised her $2000 later.

"We find no error in the rulings admitting and thereafter refusing to strike out the testimony of this witness. It tended in some degree to establish the motive advanced by the prosecution—collection of insurance money coupled with the purpose of marrying another woman. It also tends to disclose an effort on the defendant's part to establish an [fol. 2710] alibi in the event his foul deed came to light.

[3] "At approximately this point in the trial the prosecution was about to offer in evidence a statement or confession made by the defendant in the early morning hours of May 3, 1936, in the office of the district attorney and in the presence of several persons. Preliminary to such offer, however, and upon objection thereto by the defendant, the People undertook to establish that the statement or confession was the free and voluntary act of the defendant, uninfluenced by promises, threats or persuasions. Defendant, on the other hand, undertook to establish that the statement or confession was improperly extracted from him. As a result, much of the evidence on this phase of the case is highly conflicting, the defendant in many instances contradicting the People's showing. The conflict so created was resolved against the defendant by the trial court in the first instance upon its ruling admitting the statement or confession as the free and voluntary act of the defendant and by the jury in the second instance by its verdict finding him guilty as charged. However, in view of the vigorous presentation and argument of this point upon the present appeal, we feel justified in developing the matter at some length in order that the general state of the record in this respect may be known.

"The defendant took the stand on voir dire in an effort to show the asserted involuntary character of the confession and testified that he had been constantly questioned, threatened and beaten by the officers from the time of his arrest on April 19th, without a warrant, until he was 'booked' at the county jail on the 21st. He asserted that his ears were bruised and swollen and that he had suffered a hernia as a result of such manhandling. During this period he was assertedly proffered manslaughter punishment in exchange for a confession. His counsel testified that when he later saw the defendant in the county jail his ears were blue and swollen. Several depositions were offered by the defendant as tending to show that he was congenitally weak-minded and therefore more likely to capitulate to coercive methods than the average person.

"It appears from the testimony adduced by the People that the defendant was placed under observation in April, 1936, for suspected incest involving his niece, at which time the authorities uncovered and developed the criminal character of deceased's death which had occurred several months prior thereto. As a result of these developments the defendant was arrested on April 19, 1936. He was not taken without delay before a magistrate nor was he immediately incarcerated in the county jail as required by sections 849 and 1597 of the Penal Code. Instead, and after some preliminary questioning in the office of the district attorney, he was taken by the officers to a private home, adjoining that where the defendant had been living with his niece, and where admittedly he was held incommunicado for a period of about forty-eight hours, during all of which time he was admittedly subjected to incessant questioning by the officers who worked in shifts. The defendant was apparently deprived of rest and sleep during practically all of such period. At least, the prosecution failed to offer any positive testimony that defendant during this period was afforded an opportunity of going to bed, a privilege concededly enjoyed by the examining officers. In addition, one of the officers testified that during the questioning he became angered and 'slapped' the defendant's face when the defendant was said to have referred to the deceased as a 'whore'. Other than [fol. 2711] subjecting defendant to constant questioning, and the 'slap' administered to him the several officers categorically denied that any threats or promises were made to or

any physical beatings were inflicted upon the defendant during the two-day period he was being held and questioned in the private house. Charles Griffen, the assistant chief of the bureau of investigation in the office of the district attorney, while admitting the continuous course of questioning of the defendant during this period, testified that other than the slap mentioned, no force or violence was employed on the defendant; that the defendant was calm and collected; and that he appeared unafraid and answered questions (other than admitting the crime) readily and rationally.

"Everett Davis, another investigator for the district attorney, denied that the defendant was offered a lighter punishment if he would confess and testified that the defendant was told no one could offer or promise him anything but if he wanted to tell the story they would listen. He added that of his own knowledge, the defendant slept from 3:30 to 8:00 a. m., April 21st, in a chair with his feet on a second chair. Two other officers likewise denied defendant's statement of threats and violence during the period April 19th to 21st, one of whom testified that defendant explained receiving the hernia in an automobile accident. Three deputy sheriffs, who saw the defendant (stripped and otherwise) in the county jail on and subsequent to April 21st testified, in substance, that they saw no bruises, marks or discolorations on defendant's body or head and that he made no complaints as to his treatment or condition.

"It is apparent, therefore, that the evidence is sharply conflicting on this phase of the case, other than that showing continued questioning of the defendant throughout the period of April 19th to 21st, during which an ill-advised slap was administered to him, and for all present purposes the conflicts therein must be presumed to have been resolved against the defendant by both the trial court and the jury.

"Regardless of the impropriety of holding and continuously examining the defendant for many hours in a place other than a county jail prior to the filing of any charge against him, a course which we expressly disapprove, it is of the utmost significance that a confession was neither obtained nor extracted from the defendant during such period. The record definitely discloses that this treatment of which defendant here complains failed of its asserted objective. In other words, no matter how improper the treatment of defendant between April 19th and 21st, a confession did not result therefrom. It was not until May 3,

1936, twelve days later, that the confession sought to be introduced was obtained. In this respect, the evidence shows that the defendant was removed from the private house where he had been held and booked at the county jail on April 21st. One of his counsel took the stand and testified that he saw the defendant in the county jail on April 25th, at which time he instructed the defendant not to answer any questions in his absence. On cross-examination, said counsel admitted that he saw the defendant 'when he was arraigned' on April 21, 1936. It is apparent, therefore, that the defendant was not held *incommunicado* when the confession was forthcoming. He had enjoyed the benefit and association of counsel and had been before the grand jury and the court. It is also of the utmost importance that [fol. 2712] the defendant did not confess until after Hope, his accomplice, had been arrested on May 1st and had told the story to the officers in charge of the investigation. The defendant's confession followed within two days thereafter. Defendant testified further on voire dire, however, that he still suffered from the pain and memory of the prior beatings assertedly administered to him; that he was afraid to follow the advice of his counsel and continue to refuse to answer questions or to deny the statements of the officers as to the manner of the commission of the homicide; that the officers accused him of lying and threatened to take him back to the house and 'beat your God damned head off'; that he could not take another beating and therefore offered to 'gladly admit it [Hope's story] and save myself other punishment'. On cross-examination, he admitted that he did not confess following the alleged beatings administered to him by the officers during his confinement in the private house from April 19th to 21st and he also admitted that no threats, promises or beatings preceded his statement and confession in the district attorney's office on May 2d and 3d.

"Chronologically, the circumstances leading up to the confession were narrated by certain of the officers, as follows: Williard L. Killion, a deputy sheriff, testified that on the morning of May 2d, he took the defendant from his cell in the county jail to the chaplain's room; that many persons were there; that no one made any promises or exerted any coercive influence to induce the defendant to talk; that an unsuccessful effort was made to locate defendant's counsel, as requested by him; that all statements

thereafter made by the defendant were free and voluntary and without objection on his part that his counsel was not there: and that Hope was brought into the room.

"Edward F. Lynch, who reported the proceedings at this meeting, testified that deputy district attorney Williams related Hope's story to the defendant and asked the defendant if he had anything to add thereto and the defendant replied 'Nothing'. This session ended at 11:50 a. m. on May 2, 1936, whereupon the defendant was returned to his cell. Later in the day and pursuant to court order, he was taken to the scene of the homicide by a deputy sheriff. Still later, he was returned to the office of the district attorney where he answered questions in the presence of several persons. Robert P. Stewart, the chief deputy district attorney, testified that the district attorney principally examined the defendant during the afternoon of May 2d; that Hope was brought in during the session; that no promises or other improper influences were exerted over the defendant; and that defendant was rational and coherent at all times. Along about midnight the defendant was taken out to a restaurant by Killion, the deputy sheriff, and two others. While in the restaurant, the defendant, according to Killion's testimony, voluntarily unburdened himself as to the commission of the crime. In this narrative the defendant told of plotting with Hope to kill the deceased and to collect and share her insurance money. However, throughout his statement of the circumstances surrounding the commission of the crime, the defendant charged that Hope was the principal actor in the consummation of the crime. It was Hope, he said, who placed the deceased's foot in the box for the snake to bite and who later drowned deceased in the bathtub and placed her body in the fish pond. The defendant during this statement also admitted that he had had the deceased write a letter to her sister complaining of a sore foot and leg, which letter was found, [fol. 2713] unmailed, in the deceased's home on the evening of her death by the Pembertons and the defendant immediately after they had discovered her lifeless body. This letter was offered in evidence by the prosecution and there is evidence, conceded in the defendant's brief, that it was not in the deceased's normal handwriting. The inference was available to the jury that the defendant had compelled its writing, a fact later admitted by him in his confession, to furnish, if possible, an alibi.

"At the conclusion of this restaurant statement, the defendant was returned to the office of the district attorney where, between the hours of 1:30 and 3.30 a. m. May 3, 1936, according to the testimony of several there present, the defendant freely and voluntarily detailed the circumstances of the crime in a confession which the prosecution thereupon offered and had admitted in evidence.

"It cannot be said, under all of the evidence, that the court below erred in admitting the defendant's reply to the accusatory statement and his confession as free and voluntary acts on his part. It is declared in People v. Lehew, 209 Cal. 336, 341, that 'Whether a confession is free and voluntary is a preliminary question addressed to the trial court, and a considerable measure of discretion must be allowed that court in determining it. * * * In People v. Siemsen, supra, 194 Cal. 595, it is declared that the "admissibility of such evidence so largely depends upon the special circumstances connected with the confession, that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed, in the first instance, to the [trial] judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forborne to mark with absolute precision the limits of admission and exclusion." The mere fact that the confession was made to a police or other officer of the law while the accused was under arrest, does not necessarily render the confession involuntary and inadmissible. So, also, the mere fact that a confession is made in answer to questions will not authorize its rejection, though the fact of its having been so obtained may be an important element in determining whether the answers were voluntary * * * a reviewing court cannot say that the trial court committed error in admitting a confession of guilt unless such error appears as a matter of law from the record presented. The trial court is clothed with considerable discretion in determining whether or not the confession was free and voluntary, and where the evidence is conflicting on the subject, it must be assumed that the testimony concerning a defendant's admission was properly admitted.'

"In the present case the testimony is overwhelming to the effect that during May 2d and May 3d, when the statement and confession were made, no promises, immunities, threats or forms of violence were employed to overcome the free will of the defendant. This is corroborated by defendant's

own testimony. That he was questioned for many hours is not, of itself, improper, particularly when, as testified, he freely responded thereto. Some recognition must be given to the practical problems presented in the work of crime detection. A reasonable conclusion, and one which the trial court and jury might have readily reached on all the evidence, is that the defendant broke down and confessed his participation in the crime only after his confederate and accomplice had been arrested and detailed the murder conspiracy and had been brought face to face with the defendant who had been informed of the details of his confeder- [fol. 2714] ate's story. Each case must turn on its own facts and we therefore give but passing mention to the authorities relied on by the defendant.

[4] "Turning our attention now to the substance of the confession, and eliminating many unnecessary details, we find defendant relating that early in July, while the deceased was away for a few days at a convention, he and Hope planned to kill her and to share equally in the proceeds of her insurance policies; that Hope first suggested a false hold-up in which deceased would be shot, but they later agreed on Hope's second suggestion of permitting a rattlesnake to bite her in the hope that the infection would prove fatal; that he gave Hope $20 and the latter had 'certain kinds of boxes made' and brought snakes up to defendant's home in them; that Hope brought three the first time and two the second, all of which proved unsatisfactory upon experimentation with chickens, rabbits, etc.; that two days before the deceased's death he gave Hope $6 to purchase two 'hot' snakes Hope had reported seeing; that these snakes were procured and kept in boxes in his garage over Saturday night (Aug. 3, 1935); that the conspirators did some drinking with deceased that night and discussed an abortion which it was claimed she desired and believed that Hope, as an asserted medical student, was to perform the following day; that Hope left and returned the next morning about 11:00; that he gave Hope all the money he had, about $100, and left about 1:00 p. m. because deceased 'had been too good to me and I just couldn't have anything to do with that part of it'; that Hope said deceased would die in about one hour; that he (defendant) returned about 4:00 p. m. and found Hope intoxicated and that Hope had deceased 'full of liquor'; that Hope told him he had put her

foot in the box containing a snake; that Hope left and returned at 6:00 a. m., Monday, August 5, 1935; that he suggested calling it off but Hope said they had gone too far to stop; that at Hope's suggestion he left for his barber shop with the understanding that Hope would 'care' for the deceased, who was still alive, by burning the 'house up'; that Hope came to the shop about 1:00 p. m. and reported that he had not burned the house but had thrown deceased 'in the bath tub and drowned her' and then placed her body in the fish pond; that he upbraided Hope for 'the worst thing you could have done' because he [defendant] 'had a wife drown in a bath tub in Colorado Springs a little while ago'; that he told Hope 'there ain't enough men in the District Attorney's office to make me talk', adding 'and there wasn't if he [Hope] had not told it'; that he then arranged to have the Pembertons, who were innocent of the situation and whose testimony is related above, go home with him; that when he left for his shop on Monday morning he did so with the idea that deceased 'was to be murdered by Hope' and they were to share equally in the proceeds of her insurance; that the snakes were purchased for that purpose and deceased, as a ruse, was informed a desired abortion was to be performed; that after deceased's burial and while intoxicated, he may have offered the Reed woman a $1,000 to say she saw deceased alive in her yard on the day of her death; that the letter above referred to was written by deceased while intoxicated and under his direction; and that his statements were 'the true stuff' and made freely and voluntarily. During this session, Hope was brought in to the room and confronted the defendant.

"With the foregoing evidence before it the jury had ample support for its verdict. In his confession the defend- [fol. 2715] ant admitted his participation in the death of deceased, though he again undertook to point to his accomplice as the principal actor. Under settled principles, this would not, however, serve to relieve him from full responsibility for the homicide which he and his accomplice planned and perpetrated.

[5] "In addition to the evidence above narrated, and as tending to prove that the death of deceased was not the result of accident, as it at first appeared, but was deliberately planned and executed in order to collect insurance money payable on the death of the victim, the prosecution offered

evidence tending to show that a former wife of the defendant, equally heavily insured in favor of the defendant, while recovering from serious injuries incurred in an automobile accident in 1932, which the defendant survived with but little inconvenience, was likewise found drowned in the bathtub of their home with resulting monetary benefit to the defendant. In making the offer of proof in the absence of the jury, the district attorney stated that he would adduce evidence tending to show that the defendant struck his former wife on the head with a blunt instrument and then ran the automobile in which they were riding off the Pike's Peak Highway and the victim not having died from the injuries so incurred was later and while recuperating, drowned in the bath tub. This evidence, hereinafter briefly narrated, in our opinion, was sufficient, prima facie, to indicate that defendant had been a party to the death of a former wife under somewhat similar circumstances and it was apparently offered and admitted as tending to show common plan or scheme in the execution of two homicides and an absence of accident in the deceased's untimely demise. Defendant unsuccessfully objected to the admission of this evidence on the ground that it would fail to establish any of the elements of the offense for which he was on trial and would serve only to prejudice him before the jury.

"In support of its offer of proof the prosecution produced several witnesses. The first, J. D. Rogers, superintendent of the Pike's Peak Highway, testified that he first saw the defendant about 7:00 p. m., September 21, 1932, at Glenn Cove, Colorado, where the defendant reported that he had been in an automobile accident; that defendant's clothes were 'neat' and not soiled or disarranged; that he drove the defendant back to the scene of the accident, the defendant stating that he 'really don't know how it happened' as his (former wife had been driving coming down the mountain while he was looking across the valley with field glasses; that defendant said the car suddenly left the road and that he (defendant) jumped from the car after it had travelled abou fifty feet down the mountainside; that the car came to rest against a large boulder one hundred and fifty feet below the road; that he (the witness) found the deceased lying on the *right hand side* of the car (though she was supposed to be driving on the left side) with her

head down hill and her feet on the running board of the car; that her clothes were free of dirt; that the car rested on its wheels; that there was considerable blood *inside* the car, especially on the back of the cushion on the *right* side and on the floor boards; that a hammer on the floor of the car was covered with blood; that he smelled liquor from the deceased and felt a softness behind her ear when he lifted her; that there were foot prints back about eighty feet where the car left the road and on either side of the tire marks, some pointing to where the car went off the road; [fol. 2716] that the defendant's car was the last one to come down the mountain that particular evening, all others having checked out ahead; and that the defendant appeared quite calm.

"Miss Grace Yarnell, a cousin of this former wife of the defendant, testified that she had visited the injured woman while she was recuperating in the hospital, which covered the period from September 21 to October 8, 1932; that she saw the injuries over her cousin's right eye and back of her ear; that after October 8th she saw the injured person in a cottage in Manitou Springs, Colorado, where defendant had moved her prior to complete recovery; and that defendant had told her he was thrown free of the car and had lifted his (former) wife from the car and placed her on the ground with blankets about her.

"Gerald Rogers testified that he worked in the local grocery store in Manitou Springs; that defendant came to the store about 5 p. m. on October 14, 1932, ordered some groceries and asked that they be delivered; that defendant then said that he would ride home with the witness; that he (the witness) went into the kitchen and the defendant went into the bedroom and then to the bathroom; that defendant then called him and he saw defendant's wife lying on her back in a half-filled tub of lukewarm water. On cross-examination, it appeared that the defendant had ridden home with him on prior occasions.

"Dr. George B. Gilmore testified that he was coroner in 1932; that he saw defendant's (former) wife on October 14, 1932; that she was then on a bed and dead; that defendant said he had been away from home for several hours at the time of her death; that the defendant related that the doctors in the hospital had theretofore warned deceased against washing her hair because of her head injuries but

that she apparently had undertaken it in his absence and drowned as a result; and that he (the witness) suggested an autopsy but defendant opposed it, saying he 'couldn't permit anything of that sort.' The doctor then identified certain letters subsequently addressed to him by the defendant requesting a change in the death certificate in order to show that the drowning was attributable to the injuries received in the earlier automobile accident (apparently to facilitate collection under the accidental and double indemnity provisions of the insurance policies).

"Mrs. Irene F. Snyder, bookkeeper at the hospital, testified that defendant's former wife was there confined from September 21 to October 8, 1932, and that the defendant had stated at the time that he was without funds to pay the bill but intended negotiating a loan on an insurance policy. There is other evidence that defendant was financially embarrassed and had borrowed money about this time.

"The prosecution produced Doctor Decker, concededly qualified to express medical opinions, and who examined and interpreted certain X-ray photographs theretofore taken in the Colorado hospital, who testified that, in his opinion, the defendant's former wife suffered fractures of the skull from two blows, one on the side and the other on the front of the head; that the fractures had been caused by a hard, moving object being projected against the head and not by the head being projected against a hard, stationary object; and that the blow on the side of the head had been received first. That this evidence tends to support the prosecution's theory of a felonious assault on defendant's former wife must be admitted and defendant concedes in his brief that it was for the jury to weigh this [fol. 2717] evidence as against his conflicting medical testimony touching the same subject.

"John A. McKelvey testified that when defendant purchased a car from him in 1932, he stated that his previous car had been wrecked when the steering knuckle broke and the car went off the Pike's Peak road *as he was driving.*

"C. A. Pries, who was with the Prudential Life Insurance Company in 1932, testified that the defendant at that time told him he had an insurance prospect for him; that he later met Miss Winona Wallace (who subsequently became defendant's wife and, as shown, was found drowned

in the bathtub of their Colorado home) at defendant's apartment; that defendant said he wanted a $5,000 policy on himself and a similar policy on the lady; that the defendant asked if he could be named beneficiary in the latter policy and was informed that this was not possible until the parties were married; that the two policies were later delivered, the defendant being named beneficiary in the lady's policy; that upon the death of the lady (who, as stated, had prior to death married defendant) the defendant asked for double indemnity payment under the policy; and that the defendant only carried his own policy for three months. The witness thereupon identified a check sent later to the defendant in payment of his claim under the policy.

"Bayard Judd, who was with the Kansas City Life Insurance Company, testified that just prior to the death of Winona Wallace James (defendant's former wife), she and defendant had sought an immediate loan on that company's policy covering her life.

"We find no error in the trial court's admission of this evidence touching the Colorado incident involving the death of a prior wife of the defendant under circumstances similar in many respects to the circumstances surrounding the death of the deceased for which he was on trial. In each instance the defendant had placed his asserted victim in touch with insurance agents with a view to and ultimate procurement of life insurance on her. In each instance defendant inquired whether he might be named beneficiary when the parties were not married. In each instance he received a negative reply and thereafter married the asserted victim. In each instance a policy or policies were issued naming him as beneficiary. In each instance the insured was shortly thereafter found drowned in or near the home she occupied with the defendant under circumstances having an appearance of accident but upon full and close inspection tending strongly to indicate foul play. In each instance the defendant claimed under the accidental double indemnity provisions of the policy or policies and, in each instance, ultimately profited financially by the collection of his wife's insurance.

"In view of these many similar and unusual circumstances, we are of the view that the evidence of the Colorado incident was admissible not to prejudice the defendant by proof of the prior commission of another crime but as tending to establish that the death of the deceased in the

present action was not accidental, as it might at first appear, and as claimed by the defendant, but was the result of a general plan or scheme on the defendant's part to insure, marry and murder his victims in order that he might thereby profit financially. In its instructions to the jury, several of which were requested by the defendant, the court below properly limited the purpose for which it might consider this evidence. That evidence of prior similar acts and crimes is admissible for the purposes already mentioned, is now well established. (People v. Stutsman, 66 Cal. App. [fol. 2718] 134; People v. Barnes, 111 Cal. App. 605; People v. Morani, 196 Cal. 154, 160; Holt v. U. S., 42 Fed. Rep. [2d] 103, 106-107; People v. Gosden, 6 Cal. [2d] 14, 24. See, also, the English 'bathtub' murder case, R. v. George Joseph Smith, 21 Crim. App. Rep. 229, 236.)

"The Morani case, supra, contains the following: ' "In the case of People v. Seaman, 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203, it is said: 'Upon principle and authority it is clear that where a felonious intent is an essential ingredient of the crime charged, and the act done is claimed to have been innocently or accidentally done, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result as tending to show guilty knowledge, and the intent or purpose with which the particular act was done and to rebut the presumption that might otherwise obtain.' " '

"It is stated in the Holt case, supra, that 'No good purpose would be served by a review of the myriad of cases where evidence of other and collateral transactions has been admitted to prove the quo animo, scienter, motive, or intent of the defendant in the doing of a particular act; nor in restating the circumstances under which such evidence may strongly tend to support the charge made. Many of the authorities would be inapplicable to the present case, for there the evidence was introduced to show knowledge, while here its purpose is to negative the claim of accident and the alleged innocent motive, injected into the case by the defendant himself. It is sufficient to say that from the earliest times the propriety of admitting evidence for the purpose here stated has been fully recognized. * * *

" 'When introduced to show intent, or repel the possibility of accident or mistake, the time of occurrence of the

collateral circumstance is immaterial. Such duplication of the same situation is just as abnormal after the time laid in the indictment as before. Accordingly it is held that evidence of the collateral circumstance after as well as before the alleged commission of the crime may be admitted. * * * The courts generally use the phrase "at or about the same time," but it is clear, we think, that the length of the separating interval, and the fact that evidence of but one other similar instance was here proved, go only to the weight of the evidence, not to its admissibility. * * * In each case the question is, and of necessity must be, whether the evidence tendered has probative effect, logically and under the doctrine of chances. If it has, and we think such is the case here, it should not be excluded simply because it also shows the commission of another crime. This last fact is immaterial.'

"In the Gosden case, supra, the evidence tended to show that approximately six years prior to the death of his wife for which defendant was then on trial, a former wife of the defendant came to an untimely death under somewhat similar circumstances. We there declared that 'Turning now to the questions of law raised by appellant, the first contention made is that the trial court erred in admitting evidence of the death of appellant's former wife, Vivian Taylor Gosden. It is not necessary to repeat the evidence to show the similarity of the circumstances surrounding the deaths of appellant's two wives. This evidence tended to show that each died of strychnine poisoning, each was insured with the appellant as the beneficiary, and in each case the appellant attempted immediately upon the death of the wife to collect the insurance upon her life. The evi- [fol. 2719] dence as to the death of the first wife and the fact that her life was insured with the appellant as beneficiary was properly admitted to show the motive of appellant in the murder of his second wife. (People v. Northcott, 209 Cal. 639, 652, 289 Pac. 634, 70 A. L. R. 806.)'

[6] "Nor do we think that in the present case the prosecution was required, as urged by defendant, to prove the elements of the asserted Colorado crime beyond all reasonable doubt, as would be the case were the defendant standing trial for such asserted earlier offense. In this connection it is declared in Lund v. State, 190 N. E. (Ind.) 850, 853, that 'It is only the ultimate material facts to which the rule of reasonable doubt applies. The facts regarding

the other transactions were simply evidentiary facts introduced for the purpose of being considered, together with all of the other evidence in the case, upon the question of criminal knowledge and intent; and though the jury may have entertained some reasonable doubt as to some of the other transactions, or some of the other items of evidence, which tend to prove guilty knowledge or intent, if, notwithstanding that fact, and having considered the evidentiary facts, doubtful and otherwise, they were convinced beyond a reasonable doubt of the ultimate fact of guilty knowledge and intent, it is sufficient.'

"In 1914, Ohio adopted a contrary rule when in the case of Baxter v. State, 110 N. E. 456, to which the defendant refers us, it was declared that 'Evidence that an accused was guilty of other similar offenses must be such that a jury would be authorized to find him guilty of these offenses.' However, defendant has failed to note that in the later case of Scott v. State, 141 N. E. 19, 26, the Ohio court renounced the rule of the Baxter case, declaring: Is the rule in the Baxter case based upon sound reason? It has long been the general rule that a conviction is warranted if on the whole evidence the jury is satisfied beyond a reasonable doubt that every material element charged in the crime exists and that the defendant is guilty of the crime charged. In other words, it is the holding that the state need not establish each particular fact of the case beyond a reasonable doubt, if it establishes beyond a reasonable doubt the existence of every material fact alleged in the indictment and the guilt of the defendant. * * * If testimony with regard to other similar crimes is to be dealt with as other evidence, it falls under this general rule and need not be discarded simply because particular items tending to prove other similar offenses are not established beyond a reasonable doubt, so long as the jury, from the whole testimony, are convinced to a moral certainty of the guilt of the defendant of the crime charged and of the existence of every material element necessary to establish that guilt.

" 'That this common sense view of the situation obtains in certain other American jurisdictions is shown by the fact that while the case of Baxter v. State, supra, is the leading case which lays down the doctrine here discussed, it is by no means universally followed in its exact terms. While the Baxter case is frequently cited, the degree of proof required in this class of testimony is held on excel-

lent authority to be positive or substantial, but not "beyond a reasonable doubt".'

"In effect, we recently held in People v. Thorne, 10 Cal. (2d) 705, 708, that evidence which merely *tends* to show an attempt to commit or the commission of other offenses is admissible to prove common scheme or plan even though it falls short of proving the corpus delicti of such other [fol. 2720] offenses. In so concluding, we quoted from People v. Whiteside, 58 Cal. App. 33, 38-41, to the effect that 'If viewed with respect to its relevancy as tending to show that the facts constituting the charge contained in the information were a part of a scheme to defraud the public as distinguished from a single individual, it was not necessary in order that Stivers' testimony be admissible that an attempt be shown to have been made to sell him any stock or that the evidence, if accepted as true, should tend to show the commission of an offense like in character to the one charged. • • •'

"We also there quoted from People v. Sindici, 54 Cal. App. 193, 196, to the effect that 'Where the very doing of the act charged is in issue [as here] and is to be evidenced, one of the essential facts admissible is the person's plan or design to do the act. This plan or design itself may be evidenced by his conduct, and such conduct may consist of other similar acts so connected as to indicate a common purpose including in its scope the act charged. • • •'

"In People v. Baker, 92 Cal. App. Dec. 370, 372 [25 Cal. App. (2d) 1] it is declared in part that 'It is not essential that such similar transactions shall have resulted in the commission of a crime. It is sufficient if they tend to prove a scheme of the defendant which included the acts charged.'

"In view of what has been said we are of the opinion that upon its offer of proof of the prior and in many respects similar Colorado incident, the prosecution made a substantial showing tending to prove that on that occasion (as well as on the one here under review) the defendant had financially benefited by the untimely drowning at home of his wife on whom, as here, he had previously procured insurance in which, as here, he was named beneficiary. Upon this substantial offer, later supported by the proof above narrated, the court below correctly admitted the evidence touching the prior incident in order that the jury in its weighing of the entire evidence might determine whether it tended to show a common plan or scheme on the defend-

ant's part or tended to overcome the asserted element of accident involved in the death of the subsequent wife, for which death he was then on trial.

"But, even if we assume, as defendant would have us do, that the authorities require the asserted prior Colorado homicide to be proved beyond all reasonable doubt, no prejudice could have resulted to the defendant from the admission of the evidence for the court below, concluding that the rule as is now being assumed, instructed the jury that it must believe beyond all reasonable doubt that defendant's former wife was murdered before it could consider the facts of that transaction in connection with the case at bar. It is to be assumed that the jury abided by the instructions given by the court.

"In an effort to show that the deceased was alive on Monday morning, August 5th, when according to Hope's story she was dead, defendant produced a neighbor who testified that when he was in his yard at 9:25 a. m. on said morning he saw a mature, blonde woman, approximately five feet eight inches tall, wearing a rust colored smock, in the defendant's yard; that he had seen a woman in the yard on previous occasions but could not say it was the same one; and that he had never met the deceased nor had she been pointed out to him. Even if it be conceded that the person so described by the witness bore a resemblance to the deceased, the matter was one for the jury to resolve along with all other conflicts in the evidence.

"The defendant's sister testified that she visited with [fol. 2721] him and the deceased early in July, 1935, and saw Hope there on several occasions; that she heard the deceased state she desired an abortion whereupon the defendant said Hope would 'take care of her'. The witness also testified that during 1933-34 the defendant had loaned her several hundred dollars. This evidence was apparently offered for the purpose of overcoming the prosecution's showing that defendant was financially embarrassed and in need of the deceased's insurance moneys.

"Defendant also called one of the barbers in his shop who testified he saw the defendant on August 5, 1935 (after the killing but prior to the finding of deceased's body), and that he appeared normal, was not intoxicated and did not exude an odor of liquor. This testimony obviously was intended to rebut portions of Hope's testimony, particularly that part to the effect that during and immediately following the

commission of the homicide he and the defendant had imbibed rather freely of liquor.

"The defendant also produced a naturalist who expressed his views as to the habits of snakes, their average life when held in captivity and the effect of snake bite upon human beings.

"The defendant took the stand in his own defense and denied Hope's story that they had planned to murder, and had murdered, the deceased, by means of rattlesnake infection, drowning, or otherwise. He did testify, however, that Hope came to his home on July 3, 1935, in an intoxicated condition and expressed a desire to stay; that he told Hope to return sober the following day; that Hope, at the time, had with him a box of rattlesnake venom (which tends to corroborate portions of the prosecution's testimony to the effect that Hope was at the defendant's home and possessed reptile venom); that on July 6th, Hope came to his barber shop and again asked leave to stay at defendant's home; that he gave Hope the key and he came that night and stayed several days; that he introduced Hope to the deceased, his sister and his niece as 'Dr. Smith'; that at one of the breakfasts the parties discussed the pregnancy of the deceased and deceased during the course of the conversation stated that she could not go through with the ordeal of child-birth and that 'Dr. Hope will take care of me' (though earlier defendant had testified he introduced Hope as 'Dr. Smith'); that he saw Hope again on August 3d (which corroborates Hope's story of being with defendant two days prior to the homicide) but that Hope did not deliver any rattlesnakes to him; that Hope came to his home on August 4th (the day prior to the homicide) to abort the deceased (again corroborating Hope as to being at defendant's home at that time); that he did not approve of an abortion and left home while Hope 'cared' for deceased; that Hope left about 1:00 p. m. of that day and he did not see him again between that time and the time of the asserted drowning of deceased the following morning; that while he aided the deceased in taking out insurance on her life he did not do so with any thought of thereafter murdering her and collecting the same; that he did not cause the deceased to write the unmailed letter to her sister, found in the house and referred to above, but in his 'confession' had admitted so doing because one of the officers required it; and that on the day before her death the deceased stated to him that she had cut her foot on a

tin can while walking barefooted in the yard (this apparently to explain the laceration on her foot which the prosecution contended was inflicted by the fang of a rattlesnake). On cross-examination the district attorney confronted the [fol. 2722] defendant with his inconsistent statements made to the police on August 7th, two days after deceased's demise, and several months prior to his arrest therefor, to the effect that she had not mentioned a cut or swollen foot to him. Inconsistencies between his testimony and prior statements to friends as to the movements of deceased and himself on Sunday, the day preceding her death, appear in the evidence. In rebuttal of his testimony that he opposed the abortion which deceased assertedly desired, the prosecution recalled Mrs. Pemberton, the friend who was with her husband and defendant when the body was found, whereupon she testified that a few days before the deceased's death the defendant told her (the witness) that deceased was 'crazy to have a baby, but I don't want one'. We will not undertake to set out additional inconsistencies in statements of the defendant. These were matters for the jury to determine in its consideration and evaluation of the entire evidence. The jury was fully instructed on the law and no complaint is here made of any of the instructions.

"The entire record has been examined and all contentions advanced have been considered. Reference to other items of evidence not here mentioned would neither add to nor detract from the conclusion here reached. Sufficient has been said to illustrate that the verdict finds ample support in the evidence and that the judgment entered thereon should remain undisturbed."

[7] In the briefs filed before the former opinion was rendered, appellant made no claim that any error had been committed in the giving or refusing of instructions to the jury. Appellant filed his petition for rehearing but made no such claim therein. Such claim was first advanced in a supplemental brief filed by appellant shortly before the oral argument on rehearing. An appellate court is ordinarily justified in ignoring points so tardily raised but, owing to the nature of this case, we have reviewed the entire charge to the jury, giving particular attention to appellant's claim of error with respect thereto.

The challenged instruction was one of several given on the subject of the necessity for corroboration of testimony

of an accomplice. (Pen. Code, sec. 1111.) This particular instruction was given for the purpose of advising the jury of the character of testimony which might constitute corroboration. Appellant's attack is directed solely at the first sentence of this instruction which reads as follows: "You are instructed in this case that as Charles Hope is an accomplice or co-conspirator of the defendant in the murder alleged in the indictment, it is necessary that his testimony be corroborated." The instruction then continues at some length defining corroboration. It concludes "and so in this case, if you find, beyond a reasonable doubt, that the state has proven that the crime of murder was committed by the defendant, as charged in the indictment, and there is any corroboration of the testimony of the witness, Hope, of any character, falling under the definition of corroboration and the illustrations called to your attention in this instruction, then it will be your duty, under the law, to find the defendant guilty as charged".

When this instruction is read as a whole, and more particularly when it is read with the other instructions given, it is impossible to believe that the jury understood, as contended by appellant, that the court was instructing the jury that defendant had murdered the deceased and that Hope had assisted. In an instruction which was given before the challenged instruction, the court instructed the jury at the request of appellant that "Charles Hope is an accomplice [fol. 2723-2738] in this case if the crime of murder is committed and his testimony, uncorroborated by other evidence, which of itself tends to connect the defendant with the commission of the crime, is insufficient to sustain a conviction. Therefore, if you and each of you believe the testimony of Charles Hope to be true, still you cannot convict the defendant unless you find other evidence which shall, without the testimony of Charles Hope, tend to connect the defendant with the murder of Mary James."

In addition to these instructions, the trial court gave several other instructions on the subject of corroboration, which last-mentioned instructions are not challenged. The court further gave the usual instructions to the effect that the defendant was presumed to be innocent until the contrary was proved beyond a reasonable doubt; that the jury was the sole and exclusive judge of the weight of the evidence; and that it was *was* its duty "to determine all questions

of fact arising from the evidence". The court further instructed the jury, that it could not convict the defendant "unless you, and each of you, is satisfied beyond all reasonable doubt, that he killed and murdered Mary James".

Appellant has taken but a single sentence from one of the numerous instructions given to the jury and has sought to claim that the giving of said single sentence constituted prejudicial error requiring a reversal. A review of the entire charge to the jury and of the entire cause, including the evidence, convinces us that the error, if any, in the giving of the challenged instruction was not prejudicial. This conclusion finds support in the fact that appellant's counsel, after conducting the trial and reviewing the record for the purpose of presenting the cause on appeal, failed to find anything in the instructions given which he deemed of sufficient importance to call to the attention of the court in his briefs presented prior to the time that the rehearing was granted.

The judgment and order are, and each is, affirmed.

DISSENTING OPINION

I dissent for the reasons stated in the dissenting opinion filed in this action at the time of the rendition of the former opinion. This dissent is set out in full in volume 89 (2d) of the Pacific Reports at pages 54 to 108 thereof. (People v. Lisenba.)

Curtis, J.

I concur:

Houser, J.

• • • • • • •

[fol. 2739] In Superior Court of Los Angeles County

S. C. No. 64218

The People of the State of California, Plaintiff,

vs.

Major Raymond Lisenba, also known as Robert S. James, Defendant.

Affidavit in Opposition to Affidavits Filed in Support of Motion for New Trial

State of California,
County of Los Angeles, ss.:

Eugene D. Williams, being first duly sworn, deposes and says: That he is a Deputy District Attorney of the County of Los Angeles, State of California, and one of the deputies who represented the People in the trial of the above entitled cause.

In reference to the matter of the bringing into the Courtroom of two live rattlesnakes, affiant says that said snakes were brought into Court for the purpose of being identified, and were identified, as the identical snakes sold and delivered to the defendant Hope, who purchased them at the instance and direction of the defendant James for the purpose of using them, or one of them, to bite the foot of Mary James, the victim, in order to bring about her death. Said snakes were brought into the Courtroom in a glass case covered with a cloth so they could not be seen, and were offered and received in evidence as soon as was con-[fol. 2740] veniently possible after having been brought into Court. Neither affiant nor any other person connected with the prosecution of this case produced said snakes for the purpose of inflaming the minds of the jurors, but they were brought ito Court and offered and received in evidence as instruments actually purchased for the purpose of killing the victim and one of which was actually used in an effort to do so. Affiant was in the Courtroom at the time the snakes were brought in, and there was not, to the knowledge of affiant, any "wave of terror" or "exclamations of fright", nor was there any extraordinary or unusual commotion among the spectators and none among the jurors. The only reaction of the audience that was ob-

served by affiant was the natural curiosity caused by the rattling of the snakes and the desire of some of the spectators to see what was causing the sound. The entire matter of bringing the snakes into Court and dealing with them in the presence of the jury was handled in as unostentatious a way as was possible, and affiant personally suggested that the snakes should be removed from the Court room as soon as was reasonably convenient after they had been exhibited to the jury. Thereafter the snakes were again brought into the Courtroom at the request of the defendant and his counsel, and the same amount of rattling and the same amount of commotion among the spectators took place as took place at the time when the snakes wer brought in at the direction of affiant. Affiant then was and now is of the opinion that said snakes having been chosen [fol. 2741] as the instrument of death by the defendant himself, and one of them actually having been used for that purpose, it was the duty of affiant to bring said snakes into the Courtroom and exhibit them to the jury so that the jurors might know the means used by the defendant in accomplishing the murder of which he was convicted.

A. Pierce Artran did, at the request of the affiant, remove one of the snakes from its case and examine the mouth and throat of said snake for the purpose of determining its physical condition, and thereafter said Artran testified as a herpetologist and expert on snakes. The examination of the snake was made by Artran because the question of the possible length of life of a rattlesnake in captivity was injected into the case by testimony produced by the defendant, and the physical condition of a snake, according to experts consulted by affiant, including said Artran, is a matter which affects its length of life in captivity. Snakes are sometimes affected by a disease which affects the throat and mouth, and it was considered advisable by affiant to determine whether the snakes involved in this case suffered from such disease. Such was the purpose of having the snake removed from the box and examined. This examination took place during a noon recess of Court; there were no members of the jury present; the snake did not escape, but was drawn from the box on to the floor and then promptly pinned down with an appropriate instrument to enable Artran to pick it up and examine its mouth. After [fol. 2742] such examination had been completed the snake was promptly returned to the box.

With reference to the magazine article appearing in "Liberty", affiant directs the attention of the Court to matters which were taken up in open Court concerning said article and which were substantially as follows: That the Court directed the jurors not to read said article; that thereafter counsel for the defendant called Scott Littleton to the stand and endeavored to cross-examine him with reference to said article, all of which appears in the record. If any prejudice was suffered by the defendant by reason of said article it was brought about by the conduct of defendant's counsel in bringing the matter and some of the alleged contents of said article to the attention of the jury over the objection of the District Attorney.

Affiant was present at the time of the altercation which took place between the witness Southard and Mr. Clark. It is true that Southard did make an offensive remark to Clark and stated that if Clark were not such an old man he would beat him up, or words to that effect. Affiant immediately stepped between Southard and Clark and directed Southard to leave the Courtroom which Southard did; thereupon Clark proceeded to make an inflammatory speech in which he stated that he would kill Southard, that he would come into Court armed at the next session of the Court and that if Southard appeared in Court again the [fol. 2743] District Attorney would have to hire a new investigator as he, Clark, intended to shoot Southard on sight. All of this happened after adjournment of Court, after the jurors had left the Courtroom, and was not in the presence of the jury or any of the jurors. If an atmosphere of terror was thrown around the Courtroom by reason of such conduct the terror was caused by the threats of Clark to kill Southard, as such threats were the only threats that were made.

With reference to the alleged newly discovered evidence brought to the attention of defendant's counsel through a letter received from a person at Pike's Peak, affiant states that said letter was exhibited to the judge and to counsel and to affiant by counsel a number of days before the completion of the taking of evidence in the case, and that no application for a commission to take deposition was ever made; that so far as affiant knows no effort to ascertain whether the witness would testify as indicated by the letter was ever made; there was no showing that such witness would so testify, or that said letter was in fact sent by a

person who intended to testify, and, in addition thereto, said evidence, if it exists, was merely cumulative of the testimony of the defendant himself.

Eugene D. Williams.

Subscribed and sworn to before me this 18th day of August, 1936. L. E. Lampton, County Clerk, by F. R. Cummings, Deputy. (Seal.)

[fol. 2744] **Instructions**

Defendant's Instructions No. —

The burden devolves upon the prosecution to prove the voluntary character of a confession. In this case, the prosecution assumed to do so. Upon production of the proof, however, the defendant questioned the voluntary character of the confession alleged to have been made and ~~asked to introduce evidence concerning the same and did~~ introduced evidence which, if true, shows that such confessions to have been involuntary. ~~If there had been no conflict of proof, it would have been the duty of the Court to exclude such confession from you entirely.~~ After all the proof on the subject had been introduced, however, there was a conflict of evidence as to the character of the confessions as being voluntary or involuntary. Under the circumstances it became the duty of the Court to receive such confessions and submit them to you for your consideration, instructing you, however, as to the law concerning them.

Given as modified, Fricke, Judge.

~~Refused, ——, Judge.~~

[fol. 2745] Defendant's Instruction No. —

You are instructed that confessions made by the accused under the promise or encouragement of any hope or favor made or held out to him by officers or other persons in authority or by a private person in their presence, are not voluntary and therefore are not admissible. So, in this case unless the prosecution has shown that the alleged confession made by the defendant were not made under the promise or encouragement of any such hope or favor made

or held out to him by the investigators of the District Attorney's office, or the Deputy Sheriff working with them, you must disregard such confession entirely.

Given, Fricke, Judge.

~~Refused, ——, Judge.~~

Defendant's Instruction No. —

You are instructed that a confession obtained by or made under the influence of threats or fear, being involuntary, is inadmissible and unless you believe, from the evidence, that the confessions of the accused made to Deputy Sheriff Killian and to Miss Dorothy Adams were not obtained by or made under the influence or threats or fear, you must disregard such confessions entirely.

Given, Fricke, Judge.

~~Refused, ——, Judge.~~

[fol. 2746] Defendant's Instruction No. —

The threats which will exclude a confession include acts as well as verbal expressions and if the confession was inspired by threats, the degree of fear inspired is not material provided that it is other fear than that which is produced by the fact that the accused has been charged with a crime and has been arrested and may be punished for the crime.

Given, Fricke, Judge.

~~Refused, ——, Judge.~~

Defendant's Instruction No. —

In considering whether the confession were freely and voluntarily obtained, it is necessary that you should take into consideration the time, the place, the party to whom and the circumstances under which the said confessions were made. In doing so you must consider all the conduct of the parties who were present when the confession was made, not only at the time of such conduct, but at all times while the defendant was under their custody, control or

dominion or were able to exercise or apparently exercise authority over him.

[fol. 2747] Given, Fricke, Judge.

~~Refused, ——, Judge.~~

Defendant's Instruction No. —

A confession will be received if it was, in fact, voluntary although it appears that prior thereto and after his arrest accused had been threatened or promises had been made without success for the purpose of procuring a confession. But where threats, force, violence, torture, intimidation, hope of reward or promise of immunity has been used, whether successfully or not, it must affirmatively be shown that a subsequent confession was not caused thereby if the influence of any promise, threat, force, violence, intimidation, torture, hope of reward, or promise of immunity is promised to continue until it is affirmatively shown to have been removed.

Given, Fricke, Judge.

~~Refused, ——, Judge.~~

[fol. 2748] You are instructed that, before you can consider any confession of the defendant as evidence against him, if you find that the defendant has made a confession, you must believe that such confession was freely and voluntarily made, and was not the result of inducement, coercion, intimidation, threats, violence, promises or duress exercised by any officer of the law, or any other person, upon the defendant. Unless you believe that such confession was freely and voluntarily made by the defendant, with full knowledge of its meaning and effect, then you must disregard such confession entirely from your consideration. If, on the other hand, you determine that the state has established the fact that the defendant made a confession and that it was freely and voluntarily made by the defendant, then, under these circumstances, you may consider the confession for all purposes in the case and give to it the same

consideration that you would give to any other evidence in the case.

Peo. v. Lehew, 209 Cal. 336 at 342.

Given ~~as modified.~~

~~Refused,~~ Fricke, Judge.

[fol. 2749] You are further instructed that in considering the question of the free and voluntary character of a confession, that any secret hope possessed by a person who makes a confession, which hope is a product of the mind of the defendant making a confession and was not created by an officer or official, will not render a confession so made by one entertaining such hope inadmissible or invalid. Such a confession may be considered by you the same as any other evidence in the case.

Given ~~as modified.~~

~~Refused,~~ Fricke, Judge.

[fol. 2750] Defendant's Instruction No. —

If from the evidence you believe that the defendant was arrested by investigators of the District Attorney's Office, including Investigators Southard and Griffin, that he was, shortly after his arrest, taken to the District Attorney's office and there kept; that he was not then taken before any magistrate nor was any criminal charge then pending against him and that no warrant had been issued for his arrest; and if you further believe that, having been taken to the District Attorney's Office and interrogated and he, having not then confessed to the crime of murder of his wife, that he was thereupon taken back to a house close to where he had formerly been living, and was held there and questioned by the officers during the remainder of that day and during that night, and if you further believe that the defendant had no friend or attorney present while he was being so questioned and that the officers who were exercising authority over him took turns at rest but that no rest or repose was permitted the defendant during that night; that the following day he was taken out in the custody of such investigators, together with a police officer, and that he pointed out where he understood Madge Reed to live, and

that he was thereafter taken to the District Attorney's office and was again returned to the private house, he not having, in the meantime — taken before any magistrate and no charge having been preferred against him, and no warrant [fol. 2751] having been issued for his arrest, and if you believe that he was held at such house all the succeeding night and upon the following day was taken to the District Attorney's office, again questioned, and then taken to the County Jail, and if you believe that one of his answers having displeased Jack Southard during the time he was held in such house and that until he had been booked at the County Jail, he was not permitted to undress nor given any opportunity for rest and repose, and if you further believe that when he had been taken to the County Jail and booked, he had made no confession, and if you believe, also, that upon the second of May he was taken from his ceil in the County Jail to another room therein where he was confronted with Charles Hope and that Officer Killian, Mr. Range and Mr. Williams were all present and that Mr. Williams was present for the purpose of taking down in shorthand whatever the defendant might say and that Mr. Williams was then known to defendant to be a Deputy District Attorney, and a Deputy District Attorney endeavoring to convict this defendant of the crime of murder, and if you also believe that the defendant was then informed by the said Eugene Williams that Charles Hope had made a statement accusing this defendant of the murder of this defendant's wife and that the said Eugene Williams, in making the said statement told the defendant in substance that Hope claimed that the defendant had killed his wife, Mary James by drowning her in the bathtub after having first endeavored to kill her by having a rattle snake bite her, and if you be- [fol. 2752] lieve that the defendant, having then made no confession, that the said Eugene Williams, Jack Southard and others retired to the District Attorney's office for conference and that thereafter they obtained an order of the Court for the taking of the defendant out of the County Jail and that he was taken by the said officers, or some of them, to the place where his wife had met her death and was returned to the District Attorney's office about 3 o'clock P. M. for questioning and that he had made no confession until that time and that he was questioned at the District Attorney's office by various parties until about the hour of midnight

or thereafter and that he had had nothing to eat since morning and no opportunity to sleep, and that he had requested the presence of his attorney and that no attorney representing him was present, and that, having been without anything to eat until the hour of midnight and there having been no information given him as to when his questioning would end, and if you believe that shortly after midnight of said day the defendant made a statement, in substance that he would make a confession if they would give him something to eat, and that thereupon he was taken out in the custody of Deputy Sheriffs Killian and Gray and permitted to eat and that immediately thereafter he made the said confession, then upon the foregoing facts, I instruct you as a matter of law that the confessions made under such cir-
[fol. 2753] cumstances, are not regarded as legal proof and must be entirely disregarded by you in reaching your verdict.

Formula instruction—principles of law covered by instructions given also does not include all of the attendant facts.

~~Given, ——, Judge.~~

Refused: Fricke, Judge.

Defendant's Instruction No. —

If the defendant was struck by one or more of the investigators of the District Attorney, while he was in their custody or while they appeared to be exercising authority over him, it is immaterial whether such blow was struck for the purpose of obtaining a confession from this defendant of the crime here charged, or some other crime. The defendant had a right to fear, and is presumed to have feared that unless he made such statements to his custodians as they desired in regard to any accusations which they made against him, further force and violence would be used. A confession made under such apprehension is not voluntary.

~~Given, ——, Judge.~~

Covered by Instruction—Given: ——— ———. Refused: Fricke, Judge.

[fol. 2754] Defendant's Instruction No. —

If, while efforts were being made to obtain a confession from the defendant he was struck by one of those having

him in custody, or appearing to exercise authority over him, the prosecution will not be permitted to say that such blow was not struck for the purpose of obtaining a confession.

~~Given, ——, Judge.~~

Denied—Not the Law.

Refused: Fricke, Judge.

Defendant's Instruction No. —

The fact that a confession is obtained by the promise of some collateral benefit does not as a rule exclude it, as otherwise it is voluntary and admissible but you are instructed in this connection that the promise of a meal under the circumstances existing at the time the defendant first promised to confess, is not collateral.

~~Given, ——, Judge.~~

Covered.

Refused: Fricke, Judge.

[fols. 2755-2756] Defendant's Instruction No. --

If you find from the evidence that while the defendant gave some answer displeasing to Jack Southard while the defendant was being held by deputies of the District Attorney in their efforts to obtain a confession from him, you are instructed that such violence so used renders inadmissible a confession subsequently made at any time when the said Jack Southard appeared to have authority or to be one of those having authority, custody or control of the defendant, unless it affirmatively appears that defendant was given such assurance of no further violence as to be sufficient to remove all fear thereof from the mind of a person of that violence.

Admissibility of confession never depends upon one but does depend upon all of the circumstances. Instruction does not correctly state the law. Rules applicable covered by instructions given.

~~Given, ——, Judge.~~

Refused: Fricke, Judge.

* * * * * * *

[fol. 2757] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF PORTIONS OF THE RECORD TO BE PRINTED—Filed June 22, 1940

Received copy of within document Jun. 20, 1940. Earl Warren, Attorney General. By Frank Richards, Deputy.

[fol. 2757-1] To the Honorable Supreme Court of the United States:

In compliance with paragraph 9 of Rule 13, Rules of the United States Supreme Court, appellant intends to rely upon the following points and grounds:

I

That the bringing of live, hissing rattlesnakes into a courtroom and exhibiting them to a jury was so inflammatory and frightening in its nature as to make of the trial a mock and sham and violate the fundamental guarantee of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

II

That the bringing of live, hissing rattlesnakes into a courtroom and exhibiting them to a jury was so inflammatory and frightening in its nature as to make of the trial a mock and sham, and denied to the appellant the equal pro-
[fol. 2757-2] tection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

III

That third degree brutal methods were used upon the defendant Lisenba (Robert S. James) to coerce and extort a purported confession, and that the use of such alleged confession obtained by such means and methods make void the entire trial under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

IV

That third degree brutal methods were used upon the defendant Lisenba (Robert S. James) to coerce and extort

a purported confession, and that the use of such alleged confession obtained by such means and methods denied to the appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

V

That prolonged questioning without sleep and under tortuous mental ordeal, similar to that employed in the dark ages, and in the torture chamber, were used upon the defendant, and statements thus extorted and coerced were permitted in evidence in the trial. That the use of the alleged confession in evidence obtained by these methods was in [fol. 2757-3] violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

VI

That prolonged questioning without sleep and under tortuous mental ordeal, similar to that employed in the dark ages, and in the torture chamber, were used upon the defendant, and statements thus extorted and coerced were permitted in evidence in the trial. That the use of the alleged confession in evidence obtained by these methods denied to the appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

VII

That the principal evidence against the defendant was that of an alleged accomplice named Charles H. Hope. That since the trial the said Charles H. Hope has made affidavits and filed the same in the Superior Court of Los Angeles County, stating that his testimony was obtained by deceit, fraud, collusion and coercion and was entirely false; that he was impelled by force and fear, threats and promises and that all these facts, including the falsity of his statements, were known to the prosecution and participated in by them. That testimony thus obtained and the conviction based thereon make a trial a mere pretense and are all in violation [fol. 2757-4] of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

VIII

That the principal evidence against the defendant was that of an alleged accomplice named Charles H. Hope. That

since the trial the said Charles H. Hope has made affidavits and filed the same in the Superior Court of Los Angeles County, stating that his testimony was obtained by deceit, fraud, collusion and coercion and was entirely false; that he was impelled by force and fear, threats and promises and that all these facts, including the falsity of his statements, were known to the prosecution and participated in by them. That testimony thus obtained and the conviction based thereon make a trial a mere pretense and denied to the appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

IX

That alleged evidence of another purported offense in another state was presented in the trial of this case, without any indictment, information or judgment thereon and without any jurisdiction of the California court of the subject matter therein, and that said use of said testimony placed the defendant upon trial in California before a California [fol. 2757-5] jury on such purported offense, and is in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

X

That alleged evidence of another purported offense in another state was presented in the trial of this case, without any indictment, information or judgment thereon and without any jurisdiction of the California court of the subject matter therein, and that said use of said testimony placed the defendant upon trial in California before a California jury on such purported offense and denied to the appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

XI

That Major Raymond Lisenba was unlawfully imprisoned and isolated in a private building for three nights and days, before being lodged in any jail; that he was then held practically incommunicado for eleven days, and almost incessantly questioned by officers until the alleged confession was given, and that the use thereof in evidence in the trial was in violation of due process of law guaranteed by

the Fourteenth Amendment to the Constitution of the United States.

XII

That Major Raymond Lisenba was unlawfully imprisoned [fol. 2757-6] and isolated in a private building for three nights and days, before being lodged in jail; that he was then held practically incommunicado for eleven days, and almost incessantly questioned by officers until the alleged confession was given, and that the use thereof in evidence in the trial denied to the appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

XIII

That the repeated taking of defendant Lisenba from jail without his attorney and against his consent and to the office of the district attorney and other places and after prolonged questioning without food and without rest, and thereafter extorting a purported confession which was used in the case against appellant, was in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

XIV

That the repeated taking of defendant Lisenba from jail without his attorney and against his consent and to the office of the district attorney and other places and after prolonged questioning without food and without rest, and thereafter extorting a purported confession which was used [fol. 2757-7] in the case against appellant, denied to the appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Appellant designates the following portions of the record to be printed:

Partial clerk's transcript designated page 2307, etc., of the record, and ending at page 2372;

The following portions of the reporter's transcript of testimony:

The testimony of Mrs. Viola Pemberton, p. 17, line 6 to p. 29, line 9 incl.; p. 32, lines 23-24; p. 33, lines 21-25; p.

34, line 12 to p. 45, line 24 incl.; p. 46, line 22 to p. 52, line 23, incl.;

The testimony of James Pemberton, p. 54, line 11 to p. 100, line 12 incl.; then p. 100, line 20;

The testimony of John P. Toohey, p. 101, line 8 to p. 102, line 21; p. 103, line 15 to p. 113, line 9; p. 113, line 20 to p. 114, line 11;

The testimony of Charles H. Hope, p. 135, line 5 to p. 156, line 8 to and including the word "yes"; p. 157, line 13 to p. 186, line 13 incl.; p. 187, line 8 to p. 189, line 20;

The testimony of Dr. A. F. Wagner, p. 191, line 1 to p. 192, line 1 incl.; p. 192, lines 13-15 incl.; p. 193 line 1 to p. 210, line 10; p. 211, line 11 to p. 212, line 21; p. 212, line 25 [fol. 2757-8] to p. 213, line 17; p. 220, lines 21-23 incl.; p. 227, line 14 to p. 228, line 15; p. 229, line 26 to p. 230, line 9;

Charles H. Hope cross examination, p. 261, line 3 to p. 266, line 15; p. 266, line 22 to p. 267, line 5; p. 267, line 9 to p. 268, line 2; p. 269, line 2 to p. 271, line 8; p. 272, line 4 to p. 275, line 18; p. 277, line 20 to p. 285, line 6; p. 285, line 13 to line 17; p. 285, line 23 to p. 292, line 21; p. 310, line 4 to p. 335, line 10; p. 336, line 10 to p. 360, line 16; p. 361, line 2 to line 8; p. 361, line 14 to p. 362, line 1; p. 362, line 7 to p. 364, line 14; p. 364, line 20, to p. 372, line 22;

Objections to rattlesnakes being exhibited to the jury, p. 464, line 13 to p. 465, line 22;

Charles H. Hope, cross examination, p. 466, line 1 to p. 478, line 7; p. 480, line 10 to p. 486, line 23;

Stipulation and order making "snake man" a deputy court clerk for the custody of rattlesnakes, p. 559, line 19 to p. 561, line 10;

Testimony of J. D. Rogers, p. 612, line 12 to p. 618, line 12;

People's offer of proof of alleged offenses committed by the defendant in Colorado in 1932, p. 620, line 18 to p. 623, line 14;

Defense objections to offer of proof and argument of counsel, p. 623, line 22 to p. 625, line 7; p. 666, line 5 to [fol. 2757-9] p. 667, line 13; p. 682, line 3, the words "Mr. Clark," only; p. 685, line 14 to p. 687, line 10; p. 693, line 20 to p. 694, line 24;

Court's ruling admitting evidence to support offer of proof, p. 694, line 24 to p. 695, line 8 incl.;

Testimony of J. D. Rogers, p. 696, line 15 to p. 728, line

21; p. 729, line 11 to p. 739, line 13; p. 743, line 6 to p. 744, line 21; p. 745, line 16 to p. 793 through line 26;

Testimony of Miss Grace Yarnell, p. 794, line 5 to p. 801, line 14; p. 804, line 15 to p. 805, line 7; p. 805, line 17 to p. 806, line 13; p. 808, line 8 to p. 813, line 21; p. 814, line 15 to p. 824, line 6; p. 824, line 11 to p. 830, line 8; p. 831, line 1 to p. 836, line 2; p. 837, line 10 to p. 862, line 18; p. 864, line 12 to p. 871, line 5; p. 877, line 21 to p. 884, line 3; p. 886, line 6, to p. 889, line 8; p. 890, line 5, to line 16;

Testimony of Alva E. Custer, p. 890, line 19 to line 23; p. 891, line 4 to p. 901, line 20;

Testimony of Mrs. Irene F. Snyder, p. 902, line 1 to p. 911, line 15;

Testimony of C. A. Pries, p. 927, line 1 to line 6; p. 927, line 13 to p. 930, line 7; p. 932, line 21 to p. 949, line 9; p. 951, line 16 to p. 956, line 24 incl.;

Testimony of Dr. A. F. Wagner, p. 970, line 5 to p. 972, line 9; p. 990, line 9 to line 21; p. 991, line 10 to p. 992, line 8; p. 993, line 4 to p. 1001, line 26 incl.; p. 1002, line 13 to p. 1003, line 4;

[fol. 2757-10] Cross examination of Charles H. Hope, p. 1039, line 14 to p. 1041, line 13; p. 1043, line 11 to p. 1045, line 20; p. 1046, line 4 to line 22; p. 1047, line 1 to p. 1051, line 7; p. 1052, line 10 to p. 1053, line 13;

Testimony of Miss Grace Yarnell, p. 1062, line 8 to p. 1063, line 9;

Testimony of Edward F. Lynch, p. 1063, line 10 to p. 1067, line 4 incl.;

Defense objections to reading alleged confession to the jury, p. 1067, line 5 to line 15;

Testimony of Edward F. Lynch, p. 1067, line 16 to p. 1084, line 22;

Testimony of Dr. James Dewitt George, p. 1085, line 1 to p. 1088, line 11;

Testimony of J. C. Southard, p. 1088, line 12 to p. 1100, line 3; p. 1101, line 6 to p. 1105, line 25; p. 1106, line 15 to p. 1115, line 3; p. 1117, line 11 to p. 1118, line 12; p. 1119, line 21 to p. 1123, line 12;

Testimony of Samuel J. Silverman, p. 1123, line 14 to p. 1128, line 19;

Testimony of Robert S. James, p. 1130, line 11 to p. 1151, line 3; p. 1152, line 15 to p. 1161, line 8; p. 1166, line 26 to p. 1173, line 16;

Testimony of Dr. George B. Gilmore, p. 1175, line 11 to p. 1179, line 4;

Testimony of Ethel Smith, p. 1184, line 1 to p. 1187, line 12;

[fol. 2757-11] Testimony of Dr. Paul E. Bowers, p. 1246, line 10 to p. 1248, line 4; p. 1249, line 16 to p. 1251, line 14; p. 1253, line 7 to p. 1255, line 12;

Testimony of Dr. Charles Decker, p. 1297, line 12 to p. 1312, line 5; p. 1314, line 7 to p. 1341, line 24.

Testimony of Charles Griffen, p. 1432, line 13 to p. 1434, line 26 incl.; p. 1436, line 4 to p. 1437, line 23; p. 1438, line 25 to p. 1440, line 25; p. 1442, line 14 to line 17 incl.; p. 1443, line 1 to p. 1465, line 15; p. 1467, line 10 to p. 1474, line 4;

Testimony of Everett Davis, p. 1481, line 17 to p. 1490, line 24;

Testimony of Robert P. Stewart, p. 1491, line 3 to p. 1502, line 15; p. 1503, line 11 to p. 1504, line 15;

Testimony of Harry Dean, p. 1511, line 1 to p. 1512, line 3; p. 1513, line 6 to p. 1518, line 4; p. 1519, line 3, to p. 1526, line 20;

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Testimony of J. C. Southard, p. 1671, line 15 to line 17; p. 1674, line 1 to p. 1678, line 15;

Testimony of Willard L. Killion, p. 1678, line 17 to p. 1688, line 4; p. 1688, line 18 to p. 1695, line 7;

[fol. 2757-12] Testimony of C. W. Maples, p. 1697, line 4 to line 17;

Testimony of Edward F. Lynch, p. 1699, line 1 to p. 1700, line 6;

Testimony of Willard L. Killion, p. 1706, line 1 to line 22;

Ruling of the Court admitting alleged confession in evidence, p. 1708, line 5 to line 26, incl.;

Testimony of Willard L. Killion, p. 1709, line 7; line 18 to p. 1710, line 22;

* * * * * * *

Testimony of Edward F. Lynch, p. 1709, line 7 to line 13; line 18 to p. 1710, line 10; p. 1710, line 14 to p. 1712, line 24; p. 1713, line 10 to p. 1727, line 4;

Testimony of Dorothy Adams, p. 1727, line 15 to p. 1764, line 23;

Testimony of Charles H. Hope, recalled, p. 1767, line 14 to p. 1777, line 3; p. 1778, line 8 to line 21;

Testimony of Willard L. Killion, p. 1779, line 1 to p. 1796, line 11;

Motion to strike, p. 1864, line 3, words "Mr. Clark" only; line 8 to p. 1867, line 3; p. 1867, line 18 to p. 1868, line 9; p. 1868, line 15 to p. 1882, line 8;

[fol. 2757-13] Testimony of Joe Houtenbrink, p. 1885, line 20 to p. 1894, line 16;

Testimony of Frank Weinberg, p. 1895, line 7 to line 11; p. 1904, line 12 to line 19; p. 1907, line 26 to p. 1908, line 15; p. 1909, line 18;

Testimony of Mrs. Eva Murphy, p. 1921, line 23 to p 1935, line 3;

Testimony of Mrs. Pearl Wier, p. 1941, line 10 to p. 1946, line 19;

Testimony of Charles Martin, p. 1947, line 1 to p. 1952, line 18;

Testimony of Robert S. James, p. 2034, line 1 to p. 2050, line 6; p. 2051, line 6 to p. 2082, line 6; p. 2083, line 5 to p. 2093, line 16; p. 2110, line 15 to p. 2114, line 7; p. 2115, line 11 to p. 2118, line 19; p. 2121, line 6; p. 2124 line 1 to p. 2126, line 14; p. 2126, line 24 to p. 2128, line 17; p. 2140, line 25 to p. 2141, line 24; p. 2142, line 24 to p. 2153-c, line 8; p. 2160, line 12 to p. 2163, line 13; p. 2177, line 1 to line 23; p. 2184, line 4 to p. 2186, line 1; p. 2187, line 16 to p. 2187, line 21; p. 2212, line 14 to p. 2213, line 8; p. 2237, line 8 to p. 2240, line 5; p. 2271, line 23 to p. 2277, line 7; p. 2277, line 24 to p. 2280, line 14; p. 2292, line 5 to line 18.

[fol. 2757-14] Complete opinion and judgment of the Supreme Court of California and the dissenting opinion, starting with p. 2611, until the conclusion;

Opinion and judgment of the Supreme Court of California and dissent, p. 2703 to the conclusion;

Petition for rehearing commencing on p. 2385 to conclusion;

Order denying rehearing, p. 2560;

Remittitur, p. 2561;

Petition for Appeal, Assignment of Errors, Prayer for Reversal, Order Allowing Appeal, Order Staying Execution, p. 2567 to p. 2578, inclusive;

Certificate of Chief Justice of California, commencing on p. 2582 to p. 2589, inclusive;

Statement on jurisdiction, p. 2589 to conclusion on p. 2724;

Entire clerk's transcript indexed, commencing on p. 2309 and containing the indictment, the minute order of arraignment, the plea, all affidavits in support of motion for a new trial, indexed generally at p. 2309 and separately numbered, p. 160, et seq. of clerk's transcript.

Certificate of Probable Cause, p. 203-204.

Morris Lavine, Attorney for Appellant.

[fols. 2757-15–2758] [File endorsement omitted.]

[fol. 2758-1] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed July 11, 1940

To the Honorable Supreme Court of the United States:

Appellant, Major Raymond Lisenba, (also known as Robert S. James), and appellee, The People of the State of California, are desirous of having before this Honorable Court a complete transcript of all portions of the record which they deem proper and necessary to the cause herein; and

Therefore, it is Hereby Stipulated that the copy attached hereto of the Affidavit of Eugene D. Williams, a Deputy District Attorney of the County of Los Angeles, State of California, and one of the deputies who represented the People in the trial of the above entitled cause, which affidavit was filed in the trial court in opposition to the affidavits filed by appellant herein in support of his motion for a new trial, and which affidavits have heretofore been made and now are part of the record on appeal herein, and the copy attached hereto of certain instructions given and refused [fol. 2758-2] by the trial court to the jury may be certified to by the Clerk of the Supreme Court of the State of California as being full, true and correct copies of said affidavit and instructions as they appear in the Clerk's Transcript of the proceedings had in the trial of said cause and thereupon be transmitted by said Clerk to the above entitled Court for the purpose of being made a part of the record herein; and

It is Further Stipulated that said certified copies of said affidavit and instructions become a part of said record and that, if necessary, a suitable order be made by the above entitled court permitting said certified copies of said affidavit and instructions to be incorporated into and made part of and included in the transcript of the record now on file in this Honorable Court.

Dated: This 8th day of July, 1940.

Morris Lavine, Attorney for Appellant; Earl Warren, Attorney General of the State of California, by Frank W. Richards, Deputy Attorney General, Attorneys for Appellee.

[fol. 2758-3] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Crim. No. 4068

MAJOR RAYMOND LISENBA, (Also known as Robert S. James), Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, Appellee

Order

It is Hereby Ordered that the Clerk of this Court make the proper certification on the affidavit and instructions mentioned in the stipulation between appellant and appellee, (a copy of the stipulation being filed herewith), and thereupon transmit the certified copies thereof to the Honorable Supreme Court of the United States for the purpose of being made a part of the transcript of the record now on file in said court.

Dated the 9th day of July, 1940.

Gibson, Chief Justice.

[fols. 2758-4–2759] [File endorsement omitted.]

[fol. 2759-1] IN SUPREME COURT OF THE UNITED STATES

APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF THE RECORD TO BE PRINTED—Filed July 13, 1940

Comes now the People of the State of California, appellee herein, and designates the following portions or parts

of the record, which it thinks material, to be printed in addition to the portions or parts designated by appellant herein:

1. Testimony of A. L. Hutchison, page 115 lines 8 to 20 inclusive; page 119 line 6 to page 120 line 15 inclusive;

2. Testimony of Dr. A. F. Wagner, page 221 line 6 to page 222 line 3 inclusive;

3. Testimony of Dr. Gustave F. Boehme, page 230 line 21 to page 235 line 21 inclusive; page 241 line 8 to page 243 line 12 inclusive; page 243 line 18 to page 253 line 18 in-
[fol. 2759-2] clusive; page 256 line 15 to page 257 line 25 inclusive;

4. Testimony of Mrs. Edna Hope, page 373 line 14 to page 374 line 20; page 374 line 25 to page 383 line 6, inclusive;

5. Testimony of Mrs. Ethel Smith, page 384 lines 17 to 24 inclusive; page 385 line 7 to page 387 line 3; page 389 lines 2 to 25 inclusive; page 390 line 15 to page 391 line 3 inclusive; page 392 line 11 to page 393 line 4 inclusive; page 394 line 24 to page 395 line 19 inclusive;

6. Testimony of Charles Griffen, page 398, line 21 to page 400, line 8 inclusive;

7. Testimony of Roland H. Kirby, page 400 line 20 to page 401 line 24 inclusive; page 402 line 12 to page 403 line 1 inclusive; page 408 line 16 to page 409 line 8;

8. Testimony of Mike Allman, page 414 line 8 to page 419 line 3 inclusive;

9. Testimony of Irving Sherman, page 428 lines 8 to 24; page 429 line 12 to page 430 line 9;

10. Testimony of Joe Houtenbrink, page 466 lines 8 to 22 inclusive; page 467 line 13 to page 470 line 16, ending with words, "snakes from him"; page 470 line 23 to page 471 line 7, inclusive; page 472 line 18 to page 473 line 17;

11. Testimony of Lois Wright, page 487 lines 8 to 17 inclusive; page 490 line 9 to page 491 line 23;

12. Testimony of Sam Grant, page 492 line 26 to page 494 line 25;

[fol. 2759-3] 13. Testimony of Louis Berry, page 496 line 8 to page 508 line 20, inclusive; page 509 lines 5 to 20 inclusive; page 509 line 25 to page 510 line 3 inclusive;

14. Testimony of Max Galatz, page 518 line 9 to page 521 line 1 inclusive; page 521 line 21 to page 523 line 14; page 524 line 15 to page 533 line 24 inclusive; page 535 lines 6 to 14 inclusive;

15. Testimony of Gene Waddle, page 551, line 8 to page 555 line 24 inclusive;

16. Testimony of Arthur J. Hughes, page 556 lines 17 to 23 inclusive; page 557 lines 2 to 15 inclusive; page 563 line 14 to page 564 line 7 inclusive; page 565 line 24 to page 568 line 16, ending with the word, "Yes"; page 569 lines 4 to 5 inclusive; page 569 lines 9 to 17 inclusive; page 569 line 26 to page 570 line 5 inclusive; page 570 line 23 only; page 571 lines 5 to 6 inclusive; lines 10 to 12 inclusive; line 16 only; lines 20 to 22 inclusive;

17. Testimony of Dr. G. B. Gilmore, page 864 line 2 to page 888 line 22;

18. Testimony of G. B. Dunnington, page 911 line 20 to page 919 line 3;

19. Testimony of Mrs. Madge Reed, page 1006 line 1 to page 1007 line 2; page 1007 line 12 to page 1015 line 11; page 1015 line 26 to page 1019 line 2;

20. Testimony of Willard L. Killion, page 1053 line 17 to page 1055 line 14;

[fol. 2759-4] 21. Testimony of Miss Grace Yarnell, page 1061 line 5 to page 1062 line 5;

22. Testimony of J. C. Southard, page 1075 line 1 to page 1078 line 23;

23. Testimony of Robert S. James, page 1161 lines 9 to 19 inclusive.

24. Testimony of Dr. Paul E. Bowers, page 1248 line 5 to page 1249 line 15; page 1267 line 20 to page 1271 line 19; page 1273 lines 4 to 13 inclusive; page 1273 line 18 to page 1286 line 6;

25. Testimony of Dr. Charles Decker, page 1312 lines 5 to 24 inclusive;

26. Testimony of Charles Griffin, page 1438 lines 15 to 20 inclusive; page 1466 lines 17 to 25 inclusive;

27. Testimony of Jack Williams, page 1474 line 7 to page 1476 line 26;

28. Testimony of W. G. Phillips, page 1479 line 6 to page 1480 line 17;

29. Testimony of Clem Peoples, page 1504 line 19 to page 1506 line 7;

30. Testimony of Harry Dean, page 1512 line 4 to page 1513 line 2;

31. Testimony of J. C. Southard, page 1671 line 18 to page 1673 line 11;

32. Testimony of Edward F. Lynch, page 1709 line 7 to page 1713 line 6;

[fol. 2759-5] 33. Testimony of William L. Killion, page 1713 line 10 to page 1727 line 3;

34. Testimony of Joe Houtenbrink, page 1885 lines 1 to 18 inclusive;

35. Testimony of Robert S. James, page 2050 lines 6 to 22 inclusive; page 2128 line 18 to page 2131 line 5; page 2132 lines 2 to 15 inclusive; page 2133 line 16 to page 2140 line 24; page 2154 line 16 to 2160 line 11; page 2163 line 14 to page 2166 line 8; page 2166 line 15 to page 2167 line 8 inclusive; page 2167 line 15 to page 2170 line 23; page 2171 line 19 to page 2172 line 15;

36. Testimony of Scott Littleton, page 2187 lines 10 to 15 inclusive;

37. Testimony of Robert Herron, page 2197 line 1 to page 2198 line 5;

38. Testimony of Edward F. Lynch, page 2198 line 10 to page 2204 line 26;

39. Testimony of Jack Southard, page 2240 lines 13 to 22 inclusive; page 2244 lines 9 to 15 inclusive;

40. Testimony of Carl H. Scobie, page 2246 line 1 to page 2271 line 22; page 2277 lines 7 to 23 inclusive.

41. Affidavit of Eugene D. Williams filed in opposition to affidavits filed in support of motion for new trial, page 2739 line 1 to page 2743 line 25 inclusive;

42. Instructions given, page 2744 line 1 to page 2749 line 14 inclusive;

[fol. 2759-6] 43. Instructions refused, page 2750 line 1 to page 2755 line 20 inclusive.

Dated this 10th day of July, 1940.

Earl Warren, Attorney General of the State of California, and Everett W. Walton, Assistant Attorney General, Attorneys for Appellee.

[fol. 2759-7] Rec'd Copy of within, July 10, 1940.

Morris Lavine, by H. Nesbitt, Atty. for Appellant.

[fol. 2759-8] [File endorsement omitted.]

[fol. 2760] In Supreme Court of the United States

Stipulation for Additional Designations of Appellant to be Added to Printed Record—Filed July 13, 1940

[fol. 2760-1] It is Stipulated by and between Major Raymond Lisenba, also known as Robert S. James, appellant, and the People of the State of California, appellee, that the following additional designations of the appellant, in view of the appellee's additional designations, shall be added to the printed record, in addition to the portions heretofore designated:

1. Testimony of A. L. Hutchison, page 120, line 25 to page 121, line 5;

2. Testimony of Dr. A. F. Wagner, page 222, line 24 to page 227, line 13;

3. Testimony of Dr. Gustave F. Beehme, page 235, line 21 to page 237, line 9; page 237 lines 17-24; page 254, line 13 to page 256, line 15; page 257, line 25, to page 269, line 18;

4. Testimony of Mrs. Edna Hope, page 383, line 25 to page 384, line 4;

[fol. 2760-2] 5. Testimony of Roland H. Kirby, page 409, line 8 to page 413, line 11;

6. Testimony of Mike Allman, page 419, line 7 to page 421, line 19;

7. Testimony of Joe Houtenbrink, page 466, line 8 to page 478, line 7; page 480, line 10 to page 486, line 23;

8. Testimony of Sam Grant, page 495, lines 1 to 5;

9. Testimony of Louis Berry, page 511, line 6 to page 515, line 13; page 516, lines 21 to 23;

10. Testimony of Max Galatz, page 539, line 11 to page 545, line 7;

11. Objections, page 564, lines 7 to 26, to and including word "overruled"; page 569, lines 18 to 25; page 572, line 2 to page 574, line 12;

12. Testimony of G. B. Dunnington, page 919, line 7 to page 922, line 2;

13. Testimony of Madge Reed, page 1019, line 10 to page 1039, line 7;

14. Testimony of Willard L. Killion, page 1055, line 15 to page 1056, line 15;

15. Testimony of Edward F. Lynch, page 1067, line 16 to page 1075, line 26, incl.;

16. Testimony of J. C. Southard, page 1076, line 1 to page 1084, line 22, incl.;

17. Testimony of Robert S. James, page 1174, lines 2 to 15;

[fol. 2760-3] 18. Testimony of Jack Williams, page 1178, lines 16 to 23;

19. Testimony of W. C. Phillips, page 1480, line 17 to page 1481, line 12;

20. Testimony of Clem Peoples, page 1506 line 7 to page 1508, line 10; page 1510, lines 13 to 22;

21. Testimony of Robert S. James, page 2170, line 13 to 23; page 2175, lines 2 to 9; page 2176, lines 12 to 21;

22. Motion to Strike, page 2206, line 19 to page 2207 line 22;

23. Testimony of Carl H. Scobie, page 2271, line 22 to page 2277, line 7.

Morris Lavine, Attorney for Appellant. Attorney General Earl Warren, by Frank W. Richards, Deputy, Attorneys for Appellee.

[fol. 2760-4] [File endorsement omitted.]

[fol. 2761] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 28, 1940

Appeal from the Supreme Court of the State of California.

Treating the appeal papers herein from the Supreme Court of the State of California as an application for a writ of certiorari;

On Consideration Whereof, it is ordered by this Court that the said application for writ of certiorari be, and the same is hereby, granted.

And it is Further Ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 44,482, California, Supreme Court, Term No. 133, Major Raymond Lisenba, Petitioner, vs. The People of the State of California. Filed June 8, 1940. Term No. 133 O. T. 1940.

FILE COPY

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JUN 8 1940
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CLERK

pv. 164

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

469281
S. C.

No. 133

MAJOR RAYMOND LISENBA,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

MORRIS LAVINE,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 133

MAJOR RAYMOND LISENBA, (Also Known as Robert S. James),

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

STATEMENT OF JURISDICTION ON APPEAL.

In compliance with Rule 12, appellant herewith presents his statement of jurisdiction on appeal.

A.

The statutory provisions which sustain jurisdiction are Sec. 237 Judicial Code (28 U. S. C. A. 344) as amended by Act of January 31, 1928, Chapter 14, 45 Stat. 54 and Act of April 26, 1928, Chapter 440, 45 Stat. 466.

B.

The Fourteenth Amendment to the Constitution of the United States is involved in said decision, the pertinent portion of which is herein involved reading: "nor shall any

state deprive any person of life, liberty, or property, without due process of law;"

C.

The judgment in said case was rendered by the Supreme Court October 5, 1939, a petition for rehearing was filed October 25, 1939 in accordance with California practice, was entertained and considered and denied November 3, 1939. Justices Curtis and Houser voting for the hearing; Justice Carter being absent and not voting. An application for appeal was presented to the chief justice of the Supreme Court of the State of California November 6, 1939 and allowed on that date, to the Supreme Court of the United States.

D.

Nature of Case and Rulings Below.

The appellant is sentenced to death. His conviction and sentence resulted from a purported trial which was a mock and a sham, and therefore in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. *Moore* v. *Dempsey*, 261 U. S. 86; *Mooney* v. *Holohan*, 294 U. S. 103.

Two live, hissing rattlesnakes, terrifying in their nature, were brought into the courtroom (R. 201, 201) (R. 1021, 1081-82, 828-831, 822, 823, 824) placed exposed before the jury, and created such a state of fright in their minds as to bring in a death penalty verdict through passion and prejudice, and not in accordance with due process of law.

Quoting from the dissenting opinion of Mr. Justice Seawell of the Supreme Court of California in *People* v. *Lisenba*, 97 Cal. Decisions, 467 (89 Pac. (2) 39) it is stated (R. 1081-82):

> "The affidavits of R. E. Parsons and Wm. J. Clark, Esqs., defendant's attorneys, aver various acts of mis-

conduct. They are predicated in the main on the dramatic manner in which two live rattlesnakes were brought into the courtroom in a glass-covered box some five feet in length and placed in front of the jury. The snakes as carried down the aisle shook their rattles furiously. It is not necessary to describe the consternation into which the crowded courtroom was thrown. There are some things of which the court will take judicial knowledge and this is one. The inside of the box contained smears of venom where the snakes had struck the sides of the box. This was called to the attention of the jury. The averments are that spectators rose to their feet, some gasped from nervous fear and persons nearest the aisles shrank away. Many uttered audible exclamations of fright. Counsel incorporates in his affidavit as descriptive of the scene the following account taken from the Los Angeles Herald Express, a newspaper of large circulation:

"'Buzzing their hollow rattles so loudly that women in the crowded courtroom shivered and shuddered at the eerie, frightening sounds, two diamond-backed rattlesnakes glittering in their new skins today were placed on the counsel table in Superior Charles W. Fricke's court where Robert S. James, Birmingham barber, crouched ghost-faced and jittery at his trial for the murder of his golden-haired bride, Mary.

"'Paraded across the courtroom in a velvet covered venom splashed 5-foot glass cage, two deadly diamond-back rattlesnakes late today hissed and shook their hollow rattles eerily and struck out with their evil wedge-shaped heads as they were exhibited less than 2 feet away before the fascinated eyes of 10 men and 2 women who make up the jury trying Robert S. James for the murder of his golden-haired wife, Mary.'"

The Los Angeles Examiner, another newspaper of wide circulation in Los Angeles, made the following comment:

"Men's enemy from primordial ages, the snake, yesterday was made the living, visible symbol of the Robert James murder case. Two diamond-backed rattlesnakes

> hissed and struck before the trial jury as a long glass box was borne forward like a hideous offering of a black ritual."

The jury was allowed to go at large, and was subjected to the constant onslaught of prejudicial and sensational news articles of a highly prejudicial character, which as pointed out in Justice Seawell's dissenting opinion, concurred in by Justice Curtis, and Justice Houser, "was unquestionably communicated to the jury in every form of modern news transmission."

The bringing in of live venomous snakes before the jury and the exhibition of a dead snake enclosed in a glass jar, with open mouth and fangs projecting from the upper jaw, were violently objected to in the trial of the case when first brought in, said objections being overruled (R. 200, 201, 204, 205, 206, 246, 247). Thereafter, on appeal in the Supreme Court of California, which takes over death penalty cases, the majority opinion held it was proper to bring live snakes into the courtroom while the dissenting opinion held:

> "What aid the two live rattlesnakes which were brought into the courtroom, rattling and writhing, and thus exhibited to the jury in determining the cause of death on any theory, does not appear from a painstaking examination of the entire transcript of the proceedings, and we feel satisfied that the spectacular exhibition of the rattlesnakes, in the circumstances to be hereafter noted, unquestionably constituted prejudicial error." (See opinions and see dissenting opinion (R. 950, 979, 985).)

On October 25th, the Supreme Court still having jurisdiction of the cause, appellant, in accordance with California practice, petitioned to the Supreme Court for rehearing to determine whether the bringing in of live, hissing rattlesnakes in the manner hereinbefore described, and conducting a trial, or purported trial, under such circumstances

did not violate due process of law guaranteed by the fourteenth amendment to the Constitution of the United States. The court on November 3, 1939 entertained said petition on the grounds mentioned and ruled against said petitioner, holding he was not denied due process of law guaranteed by the Constitution of the United States in holding a trial with live rattlesnakes hissing at the jury (R. 842, 844 *et seq.*; R. 941; R. 948, 949, 950).

We contend that such a proceeding is not a trial, but a mask of a trial wherein appellant was hurried to conviction, and where, just as in *Moore* v. *Dempsey*, 261 U. S. 86 "counsel, court and jury were swept to the fatal end by an irresistible wave of passion and prejudice, so that no trial in a true sense was afforded."

2. That third degree brutal methods, both in the form of physical violence, and in the deprivation to appellant of sleep and rest, were used upon him to coerce and extort a purported confession (R. 449 *et seq.*), and that the use in evidence of such purported confession obtained by such means and methods make void the entire trial under the due process clause of the Fourteenth Amendment to the Constitution of the United States. *Brown* v. *Mississippi*, 297 U. S. 278; *Jones* v. *Commonwealth*, 97 F. (2d) 333.

The details of the procedure are clearly described by Justice Sewell, in his dissenting opinion (concurred in by Justice Curtis, and on rehearing by Justices Houser and Curtis), as follows, R. 979, 1056-1076:

> "On Sunday morning, April 19, James was taken from his home at 3886 La Salle Avenue by Southard, Griffen and Dean, investigators, to a private house next door, 3882 La Salle avenue, occupied by officers for spying and dictaphone purposes, where the dictaphone's part in the case was explained to him. This was done for psychological effect. Southard said he

took 'quite a crowd' with him at the time he and the officers took James to the house and exhibited to him the dictaphone apparatus. A number of newspaper men, District Attorney Fitts, Deputy District Attorney Williams, Officers Scott Littleton, Davis and Dean were among the crowd present. He was then taken to the office of Lieutenant Morgan, where he was questioned for more than an hour. He was next taken to the district attorney's office (Sunday forenoon) where he was examined at great length and was called upon to defend himself against grave charges made by the officers. Asked if James was informed that a charge of murdering his wife was under investigation, Southard answered "I believe not." Attorney S. J. Silverman, who had been James' attorney in civil matters for some time and had heard that an attempt was being made to have James indicted for the murder of his wife, and James himself testified that Silverman had instructed James to decline to answer any questions bearing on the alleged homicide except when Silverman was present. At any rate James refused to talk after he was asked the first few questions and, according to Southard, he told Fitts 'to "go to hell." ' They kept right on questioning him. Mr. Williams, a deputy district attorney, Griffen and several other investigators were present. Mr. Southard said *it could have been possible* that they told him they had the goods on him. The arrangement under which James was 'worked on' was that he was placed in a large chair, where he was compelled to sit for forty-eight hours, according to the admissions of Southard and other investigators, but, on the showing in the record, the questioning must have continued for sixty hours. The investigators worked in pairs on four-hour shifts. From sheer exhaustion the defendant several times fell asleep. Never less than two and as many as eight or ten officers were plying the defendant with questions at all hours of the night. The alleged confession began to break, after days of unremitting effort, at 1:45 o'clock in the morning. No one, not even Mr. Silverman, the defendant's attorney, or Mr. Parsons, had knowledge of the place in which the de-

fendant was held in private custody by the investigators. Neither his friends, relatives nor the public knew the place of detention. No warrant of arrest had been issued and there was no public record, or any record, which would enable any one not a member of the staff of investigators to know of or discover the presence of defendant.

"The law prescribes the place in which persons charged with crime may be detained. A private house located in a residential part of a city and not complying with the provisions of law prescribing the purpose and use of county jails and their management, is not a place where persons charged or suspected of crime may lawfully be detained. Grave abuses may be practiced against persons thus illegally held in secret confinement (Pen. Code, sec. 1597 et seq.). Every police officer who, having arrested any person upon a criminal charge, wilfully delays taking such person before a magistrate for examination is guilty of a misdemeanor (Sec. 145, Pen. Code). In the instant case the defendant was held in custody seventeen days without the issuance of a warrant and without being taken before a body which had power to examine the offense with which he was finally charged. He requested that his attorneys, first Mr. S. J. Silverman, whom the district attorney had reported out of the city for the week end, and then Mr. R. E. Parsons, be contacted. Neither appearing to be immediately available, the inquisition in which a number of investigators took part, was vigorously and unremittingly pressed, without delay through many hours. It was not a proceeding authorized by statute and no sufficient reason was or could be shown why the request of defendant for advice of counsel, a right guaranteed by the Constitution and by statute to every person charged with crime, was not complied with. Section 849 of the Penal Code provides: 'When an arrest is made without a warrant by a peace officer * * * the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint, stating the charge

against the person, must be laid before the magistrate.' Section 859, following the procedure above cited, provides that the magistrate must allow the defendant a reasonable time to send for counsel and may postpone the examination for that purpose. Upon *request* of the defendant, the magistrate *must* require a peace officer to take a message to any counsel in the township without delay and without fee. These and other provisions of the statute cannot be circumvented by resorting to any methods which tend to deny the rights and protection which the law guarantees to every person charged with a crime. The statutes impose quite substantial fines and terms of imprisonment upon peace officers for the wilful disregard of their duties (Pen. Code, Secs. 145, 147, 149).

"Early in the confinement of the defendant, Officer Southard committed an admitted battery upon him. He and Officer Griffen were 'working' on the defendant when Southard struck him, according to his admission, in the face or on the side of the head. * * * Griffen said that after James was 'slapped' they continued to question him but he saw no other violence inflicted upon him. Griffen questioned him the next night until one o'clock a.m. During all the time he was being held incommunicado he did not see James sleep. * * * James had then been questioned, admittedly for forty-eight hours. There is evidence that it was longer. * * * Griffen said that James did complain about his ear, but he examined it and couldn't find anything wrong with it. When Griffen returned to the place of examination at nine o'clock five other officers were with James. At 8:30 he was taken by Officers Kynette and Davis to Ninth and Alvarado streets. Griffen and Southard followed. At noon he was taken to the district attorney's office. Griffen did not recall whether James, when at the district attorney's office on the day he was taken into custody, had requested that word be sent to Mr. Silverman, his attorney, requesting his presence. On Tuesday he saw the defendant from seven o'clock to one p. m. At eleven o'clock he gave

instructions to 'book him' at the county jail where he was committed to the 'high power tank.'

"Southard admitted that the investigators operated in relays of pairs for a period of forty-eight hours. The defendant sat in a chair and was not allowed to remove his clothing. Several times he fell asleep from fatigue and exhaustion. * * * it was solely Southard's disappointment in failing to have broken James down by harassment, coercion and physical violence, to a state of accepting Hope's sensational story (which was a composite product of the detectives and investigators in collaboration with Hope) which ired Southard to the point of physical violence. Southard had been an investigator for eight years and was seasoned to his task. His act was inexcusable and in violation of Section 149 of the Penal Code. * * * The defendant was under no compulsion of law or duty to answer the officers in any particular manner or at all. Several apparently disinterested witnesses and one or two officers testified absolutely that James' face showed black and blue and swollen spots which were plainly visible for several days after his arrest. He testified to terrible beatings he received in the private house in which he was detained and that his body was made black and blue from the waist up and that he had suffered a hernia or rupture from the roughing which he passed through. A physician who had examined his abdomen five months prior testified that he had observed no evidence of hernia at that time but an examination since his arrest clearly disclosed the existence of a hernia. The prosecution called a few witnesses connected with the official staff who testified they did not observe any bruises on the defendant's face, but in the main their testimony was more in avoidance of direct and positive answers which should have been given by officers of the law. There can be no possible doubt, as testified to by one or two of the officers themselves, and by independent parties, that the defendant's ears bore marks and bruises which any one at all observant should have seen. James says he was practically made hard of hearing by the head beating he had received from

Southard and Griffen and that his body was black and blue from the waist line upward. * * * Southard said he gave instructions that James was not to be left alone at any time; one or more investigators was questioning him at all times; some questions he answered and some questions he refused to answer; he would just sit and look blankly. Southard testified that he had three meals a day, but James testified he was practically starved into a state in which he told the investigators he would answer any questions in any way the investigators wanted him to answer it. It is the admitted fact that he was interrogated by the district attorney and his assistant, Mr. Williams, at all hours of the night, for as many as two and a half to three hours. One period continued from one o'clock to six o'clock. The officers also took part in interrogating the defendant. The plan adopted was that the investigators worked on the defendant to a point where it was deemed expedient or advisable to take him before the district attorney and if satisfactory progress had not been made he would be returned to the private custody of the investigators for the employment of such methods as would work a change of mental attitude on the part of the defendant. No other possible answer could be made to their unauthorized action which only ended with the procurement of the alleged confession. At times numerous officers would be present, and sometimes, James testified, he was left with but one officer. The evidence adduced by the prosecution affirmatively shows that the defendant was shifted back and forwards in the manner herein described many times at all hours of the day and night, continuing over a long inquisitorial period. At times Hope was brought into the room and engaged James in controversial disputes. * * *

"James testified at the trial that practically everything he told Killion, Southard and the district attorney concerning his wife was the story which the investigators had drilled into him for hours for several days. He said he was not able to stand further beatings and physical punishment with which he was threatened;

> that if he gave an answer to a question which did not suit the questioners he was struck on the head. He had also received one or two terrific beatings at the hands of Southard and Griffen; he would have preferred death rather than be returned to the private residence, which the officers had threatened to do, where most of the punishment was inflicted. The story he told Killion had been repeated a "thousand" times to him; for days when they repeated to him Hope's story he told the officers he did not know what they were talking about until he was coerced into submission."

That the said procedure and proceedings and use of the alleged confession in the trial over objections overruled (R. 628-630) by trial court obtained in this manner made of the trial a mock and farce, that it degraded the proceedings to trial by ordeal, and trial of the torture chamber methods and that such a trial is in violation of due process of law was raised in the State Supreme Court and denied (see opinion, R. 979, 1056-1076) and on petition for rehearing on October 25, 1939, and said court again considered said right claimed under the Constitution of the United States and denied the same on November 3, 1939 (R. 842, 843, 857-885, 941, 948, 949, 950).

That such procedure and proceedings deny due process of law and is inconsistent with the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert* v. *Louisiana*, 27 U. S. 312. That to deprive a person of sleep is a form of torture not less severe than physical violence. *Ziang Sun Wan* v. *U. S.*, 266 U. S. 1, 69 L. Ed. 131. That use of third degree methods to extort a purported confession and use of same in a trial is in violation of due process of law. *Brown* v. *Mississippi*, 297 U. S. 278; *Rounds* v. *State*, 106 S. W. (2) 212; *Peo.* v. *Dye*, 119 Cal. Ap. 262.

3. That the defendant was deprived of the right of counsel after his arrest and while he was being interrogated by

the district attorney himself, and his staff; that he had asked for said Counsel Silverman (R. 466, 628), and was denied his presence (R. 473, 474), although the district attorney knew he had private counsel. That he was entitled under the Constitution and laws of the United States to be represented by private counsel of his own choice at all stages of the proceedings. That the denial of this right was a denial of rights guaranteed under the Fourteenth Amendment to the Constitution of the United States. *Powell* v. *Alabama*, 287 U. S. 45.

That this right was asserted by appellant in the trial (R. 466), and in the Supreme Court (R. 950 *et seq.*), and in petition for rehearing as a right guaranteed under the Constitution of the United States in the due process clause of the Fourteenth Amendment and said right was considered and on November 3, 1939, the Supreme Court of California held against appellant and ruled that his rights under the Constitution of the United States were not violated (R. 913, 916, 941, 950).

4. That your appellant was placed upon trial in California on a charge of the murder of Mary Emma James (R. 253-416, 448; also see opinions of Supreme Court). That without any indictment or information or other proceeding, and without any notice, or any court processes to produce witnesses, the appellee produced witnesses from the State of Colorado and introduced into the case testimony regarding the death of a former wife Winona James, in Colorado. A large portion of the trial was devoted to this evidence, and a portion of both the majority and dissenting opinion and a large portion of argument for the people is devoted to this evidence. That appellant was without notice of any such charge, and without any court processes from California to produce witnesses in rebuttal.

That the use of this evidence was challenged in the trial

(R. 254-257, 263-410, 695-993) as violating the basic right of due process of law, namely to receive notice of the charge one must meet, and be given an opportunity to meet it and that such misuse of such alleged evidence in the case contravened his rights under the Fourteenth Amendment to the Constitution of the United States. Appellant presented said claim in the trial court (R. 254, 257, 263, 410), in the Supreme Court, and upon petition for rehearing on October 25, 1939 and said court upon November 3, 1939 considered said question thus presented and ruled against the claim of your petitioner and held that no rights under the Fourteenth Amendment to the Constitution of the United States were violated. (See petition for rehearing in Supreme Court and certificate of Chief Justice Waite, R. 906-910, 947-950.)

5. Since the judgment was pronounced in the trial court, the witness Charles H. Hope has filed with the trial court two affidavits in which he repudiates his testimony in the trial of the case and asserts that his testimony was perjured and was known to the prosecution to have been perjured when given. That copies of said affidavits were presented to the Supreme Court on October 25, 1939 which was asked pursuant to Article VI, Sec. 4¾ of the Constitution of California and Section 956-A of the Code of Civil Procedure of California and Rule XXXVIII of the Rules of the Supreme Court of California for leave to produce additional evidence to show that Hope's testimony, upon which the appellant's conviction rests, was perjured and false in every material part; that to sustain a conviction upon such perjured testimony was in violation of the Fourteenth Amendment to the Constitution of the United States; such claimed right under the Fourteenth Amendment was considered on November 3, 1939 by the Supreme Court of California and denied (R. 920-940, 882-906, 941, 948-949, 950).

That a trial based on perjured testimony is in violation

of due process of law and the State which still has corrective processes, in denying them, denies due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Mooney v. *Holohan*, 294 U. S. 103;
Jones v. *Commonwealth of Kentucky*, 97 F. (2d) 333.

Each of these questions raised was substantial. (*Zucht* v. *King*, 260 U. S. 174, 176, 177.) Each denied to appellant fundamental rights to a fair trial guaranteed as a part of due process of law under the Fourteenth Amendment to the Constitution of the United States.

Objection to the bringing in of live rattlesnakes into the courtroom was voiced immediately by the counsel for defense during the trial (R. 200-201), thereafter again on motion for new trial (R. 823, 827-831), and objections were overruled and motions for new trial denied (R. 834-835). Thereafter the cause was presented to the Supreme Court which considered and denied appellant's claims therein (R. 950, 1085). Upon petition for rehearing and while the cause was still within the jurisdiction of the Supreme Court appellant challenged the bringing in of live rattlesnakes as violative of his rights under the Fourteenth Amendment to the Constitution of the United States and the court considered his challenge and denied the same. (See petition for rehearing, ruling thereon and certificate of Chief Justice, R. 842, 941, 947-950.)

That appellant objected in the trial court to the introduction of a purported or alleged confession on the ground that the same was extorted and coerced from him by third degree methods; that on *voire dire* examination and testimony he testified to the manner of obtaining the same in Rep. Transcript pages (R. 449, *et seq.*; 484-498). That Officer J. C. Southard admitted striking appellant and using physical force upon him (R. 463-464); James was

not permitted to sleep (R. 456-461, 463-475); that the trial court overruled all objections to use of alleged confession and permitted the same (R. 627 *et seq.*; 628-629). That on appeal the use of this alleged confession extorted from appellant by means of physical and mental force was challenged and the court in its majority opinion sustained the use thereof; a dissenting opinion was written on same (R. 979, 1115); that on rehearing your appellant challenged the use of said purported confessions thus obtained as violative of the Fourteenth Amendment to the Constitution of the United States and that on November 3, 1939 the Supreme Court considered said rights under the Fourteenth Amendment to the Constitution of the United States and denied the same (R. 842, *et seq.*; 941, *et seq.*; 947-949; 960, *et seq.*; 981, 1055-1077).

That objections were made to the introduction in evidence in the trial of witnesses from Colorado regarding the death of appellant's wife in Colorado (R. 253), that said objections were overruled by the trial court (R. 254, 257, 263, 410, 968-969); that the same were passed upon by the Supreme Court (R. 1041, *et seq.*; 1119-1120); and that the use of this evidence was challenged as violative of the rights of appellant under the Fourteenth Amendment to the Constitution of the United States; that the Supreme Court received said petition on October 25, 1939 in accordance with its procedure and practice and on November 3, 1939 considered the same and ruled against appellant's challenge of the use of said evidence as violative of the Fourteenth Amendment to the Constitution of the United States (R. 843, 906-910, 941, 948-950, 968-976, 1042, *et seq.*; 1102-1111).

That appellant presented for the first time affidavits which have been filed in the Superior Court of Los Angeles County which first tried the case, affidavits of Charles H. Hope the principal witness in the case against appellant

to the effect that he perjured himself during the trial and that such perjury was known to the prosecuting officers; that such affidavits were presented to the Supreme Court in the petition for rehearing on October 25, 1939, with request to take further testimony, or to grant a new trial; that the conviction based upon perjured testimony violated appellant's rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States, and such asserted right was considered by the Supreme Court and denied November 3, 1939 (R. 882-905, 941, 948-949, 950).

That your appellant also upon petition for rehearing asserted that he had been denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States in being deprived of counsel at the time of his interrogation that he requested the same and that he was entitled to counsel at all stages of the proceedings. That this right was considered by the Supreme Court of California on rehearing on November 3, 1939 and denied (R. 911-914, 941, 950).

The trial was never a legitimate proceeding from beginning to end. It was in effect a mob trial, commencing with a mob of policemen, district attorney's investigators, and the district attorney and his deputies, who without legal process kidnapped and held the appellant incommunicado and engaged in admitted tortures that resemble not a free and lawful government lawfully enforcing the law but a group of outlaws engaged in barbarities that revert to the days of trial by torture and ordeal and return us to the rack. There was a blending of rattlesnake venom with a jury verdict as a result of a pretended trial.

D.

Cases Believed to Sustain Jurisdiction.

Whitney v. *California*, 274 U. S. 357.
Fiske v. *Kansas*, 274 U. S. 380.
Stromberg v. *California*, 283 U. S. 359.
Fleming v. *Fleming*, 264 U. S. 29.
Cumberland Coal Co. v. *Board of Revision*, 284 U. S. 23.
Cincinnati P. B. S. & P. Packet Co. v. *Bay*, 200 U. S. 179.
Patterson v. *State of Alabama*, 294 U. S. 600.
Brown v. *Mississippi*, 297 U. S. 278.
Ziang Sun Wan v. *U. S.*, 266 U. S. 1, 69 L. Ed. 131.
Moore v. *Dempsey*, 261 U. S. 86.
Powell v. *Alabama*, 287 U. S. 45.
Hebert v. *Louisiana*, 272 U. S. 312.
Mooney v. *Holohan*, 294 U. S. 103.
Holden v. *Hardy*, 169 U. S. 366, 42 L. Ed. 780, 790.
Galpin v. *Page*, 18 Wall. 350, 368.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 133

MAJOR RAYMOND LISENBA, (ROBERT S. JAMES),
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

PETITIONER'S BRIEF.

MORRIS LAVINE,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 133

MAJOR RAYMOND LISENBA, (ROBERT S. JAMES),
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

PETITIONER'S BRIEF.

To the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices thereof:

This Court granted certiorari in *forma pauperis* to Major Raymond Lisenba, known as Robert S. James, from a judgment and sentence of death for the alleged murder of his wife, Mary Emma James, by drowning, pronounced in the Superior Court of the State of California (R. 1140).

A.

This is an appeal from the Supreme Court of the State of California. The facts and opinions in the court below are found in 14 Cal. (2d) 403, 94 Pac. (2d) 569, and in 89 Pac. (2d) pp. 39 to 108.

B.

Jurisdiction of this Court was invoked under the 14th Amendment to the Constitution of the United States and under Section 237c of the Judicial Code, 43 Stat. 936, 938, 28 U. S. C. A. Section 444c. This Court granted certiorari October 28, 1940.

C.

The Facts.

On August 5th, 1935, Major Raymond Lisenba, who is generally referred to in the record under the name of Robert S. James, which he took early in life, was, at about the dinner hour, returning home accompanied by two guests, Viola Lueck and James Pemberton, to have dinner with his wife (R. 2, 994). Mrs. James was pregnant at the time, so Mr. James stopped at the market on his way home and bought some soft foods for his wife, in the event she could not eat the steaks. James told the Pembertons that his wife had the vegetables ready (R. 3; R. 995).

James closed his barber shop at seven thirty, and arrived in due time with Mr. Pemberton, whom he had picked up on the way to meet Viola Lueck, who subsequently became Mrs. Pemberton, and these three drove in James' car to a market where James bought steaks and some cottage cheese. Arrangements for this dinner had been made previously by Mrs. James and Viola Lueck.

Mr. Pemberton and Miss Lueck were engaged to be married during the period of time immediately preceding Mary's death, and it had been arranged that the wedding was to take place at the James home. A relation of cordiality and friendship existed between James and his wife on the one hand, and Mr. Pemberton and his intended bride, on the other. Mutual social relations existed between the two couples, and exchanges of social courtesies were quite fre-

quent. The James home was pleasantly situated and was built in cottage fashion at 1329 West Verdugo Road, La Canada, County of Los Angeles. The yard was planted with garden grasses and contained shrubbery, flowers and a few orange and fruit trees. A lily pond occupied a part of the front yard. Cement walks led to and around the pond and walk-ways meandered around the gardens. A garage, a chicken pen, in which some four dozen chickens were kept, and a yard in which three dogs were kept, constituted the rear of the premises. The house was located in an attractive sylvan district (R. 994).

Mr. Pemberton and Miss Lueck had visited Mr. and Mrs. James on Wednesday evening, July 31st, five evenings prior to the finding of Mrs. James' dead body. At that visit the celebration of the Pemberton-Lueck wedding was discussed. It was arranged on that evening that the Jameses were to take dinner with Miss Lueck and Mr. Pemberton at the apartment house where Miss Lueck was living on Monday evening, August 5th, provided Mrs. James, who had been suffering from the symptoms of pregnancy, was able to come to Los Angeles. If not, they were to dine at the James' home (R. 13). About two o'clock Monday afternoon, August 5th, James called up Miss Lueck at her apartment, and told her that Mary was not feeling well enough to come to Los Angeles and asked her and Mr. Pemberton to come out to his home for dinner. He said that he would meet her in front of the telephone office where she worked at 7:30, after he closed his barber shop (R. 994).

The three, James driving, arrived at the James' cottage at 8:10 or 8:15 o'clock in the evening (R. 995).

James drove into the driveway at the back of the house and parked. Both witnesses, Miss Lueck and Mr. Pemberton, testified that James' conduct and appearance were usual and entirely normal (R. 31).

There were no lights in the house and the doors were unlocked (R. 22). All the parties entered the house through the rear door. They looked through the rooms and Mr. James and Miss Lueck called Mrs. James a number of times. Someone suggested that she might have fainted on the grounds. (She was six weeks pregnant, (R. 93, 791) and suffered from dizziness, and the usual characteristics of pregnancy) (R. 408). James suggested that a search be made of the yard and he got a flashlight. The fish pond in the yard contained water about fourteen inches deep. In Pemberton's search about the grounds he followed a narrow walk which led through the shrubbery to the side of and skirted the fish pond. At this point he discovered Mrs. James' outstretched body (R. 994-995). The lower limbs were resting across the narrow cement walk which was close to the water's edge, and her head and upper part of her body extended into and was submerged beneath the surface of the water, her face facing downward. He made an exclamation and went to the rear of the house to meet Mr. James. Pemberton told him Mrs. James was dead. He attempted to prevent Mr. James from going to where the body lay, but he was unable to do so. James knelt down beside the body and tried to lift her from the water but was unable to do so, and Pemberton assisted him in pulling the body back so that the head was clear of the water. Pemberton finally got Mr. James up and he had Miss Lueck take James into the house. Pemberton left to notify the sheriff's office at Montrose. Mrs. James was described by Pemberton as wearing pajamas. Miss Lueck also said she had on pajamas and bedroom slippers. The light wire fence which enclosed the rather shallow pond was crushed at the point where the body had lain. The pond was approximately twelve or fourteen feet in dimensions and the water was from ten or twelve

to sixteen inches in depth, the bottom being covered with cement (R. 996).

Miss Lueck testified that James was moved to tears and kept repeating, "Oh, I am so sick; what will I do without her." He was deeply grieved and was taken to a couch in the yard where he was prostrate for some time. A physician who had been summoned to the home administered to Mr. James. He was afterwards taken to the place where Miss Lueck lived and given such care as his condition required. Miss Lueck and Mr. Pemberton testified that his grief had all the appearance of being genuine and not simulated. The testimony is to the effect that James was kind and affectionate in his treatment of his wife and both seemed happy in their marital relations (R. 996). The home was pleasantly appointed and the grounds are described as being exceptionally beautiful.

Miss Lueck discovered in a dish or bowl on a table in the dining room, a sealed blue envelope addressed in pencil to Mrs. James' sister, Mrs. R. H. Stewart, Las Vegas, Nevada. She called Mr. James' attention to it and he requested her to open it. The letter was written in pencil on blue stationery, corresponding to the envelope, and was in the following words:

"Dear Sis.

"Just a line this morning to let you know I am pretty sick. My leg is all swollen, something bit me while watering my flowers this morning. I cut my toe yesterday and having lots of bad luck, this is old blue Monday, but my daddy will be home early to nite and he takes good care of me.

"Be sure and write me soon and I'll let you know how I get along. Sis" (R. 997).

The letter is concededly in the hand of Mrs. James.

The Cause of Death—Drowning.

Following the discovery of the body the sheriff's office was notified and two deputy sheriffs came to the house. The body was taken to the coroner's office, placed on a slab, and later embalmed.

On August 6th, some time in the afternoon, Dr. A. F. Wagner, Coroner's Physician, performed his autopsy. He gave the cause of death as DROWNING. *He stated that on opening the body he "found the lungs containing a considerable amount of water." There was no disease of any of the vital organs. The autopsy showed a normal pregnancy of about six weeks* (R. 93, 792). *Superficial bruises of varying extent were found on the various parts of the body. A chemical analysis of the stomach, liver and kidneys was made, but no poison was found* (R. 93). *He also stated that he "found a laceration on the under surface of the left great toe. The left foot was considerably swollen." While on direct examination he described the cause of death as drowning, and added that the "contributing cause of death was cellulitis" because of the condition of the left foot* (R. 94).

His testimony regarding the drowning is as follows:

"Q. I BELIEVE YOU STATED THAT IN YOUR OPINION THE CAUSE OF DEATH WAS DROWNING?

"A. YES, SIR (R. 101).

"Q. And will you just tell the jury why you fix drowning as being the cause of death?

"A. Well, these lungs were more filled up with water than we usually find even in drowning, that is, in the usual cases of drowning. The lungs were filled up, practically, with water, and in such a case, of course, that causes death.

"Q. As I understand it, the lungs are a spongy matter that expand and contract as we take in a supply of air?

"A. Yes, sir.

"Q. That is one of their principal functions?

"A. Yes, sir.

"Q. Taking in the oxygen which is necessary for combustion in the body?

"A. Yes.

"Q. And when a person's lungs become filled with water, the air is cut off by the water?

"A. Yes, sir.

"Q. The water is taken into the lungs by the movement of the lungs in contraction, is that right?

"A. That is right.

"Q. So that, if the body were already dead, you wouldn't expect to find water in the lungs? You wouldn't expect to find water in the lungs?

"A. No, sir.

"Q. Those are the facts and the process of reasoning upon which the death was caused by drowning?

"A. Yes, sir" (R. 101-102).

ON FURTHER CROSS-EXAMINATION DR. WAGNER, IN EXPLANATION OF HIS COMMENT THAT "CELLULITIS WAS A CONTRIBUTING CAUSE," STATED:

"I MEAN THAT THE DROWNING WAS SO COMPLETE THAT WE WOULD PUT IT DOWN AS THE CAUSE OF DEATH WITHOUT CELLULITIS, BUT I THINK THIS CELLULITIS BEING PRESENT IT WOULD NATURALLY HAVE TO BE ADDED AS A CONTRIBUTING CAUSE" (R. 408).

Dr. Wagner said he could not tell whether the single puncture wound on the great toe was produced by a rattlesnake fang, a dog's tooth, a needle or a sharp pointed article that was different from a fang, and he could not make any distinction as to whether the cellulitis was caused by animal poison or bacteria (R. 103). Animal poisonings include such things as *ants*, snakes, scorpions, tarantulas, spiders, gila monsters, and everything of that sort (R. 104). He said it would be impossible to distinguish between animal

poison and bacteria as a cause of cellulitis (R. 104). He testified that there was a single laceration on the underside of the great toe; that he had never been bitten by a rattlesnake, nor had he ever seen anybody bitten (R. 99). There was a puncture wound about a quarter of an inch (R. 99).

Experts testified that a rattlesnake has two fangs located in the upper portion of its mouth, facing downward, and that when a rattlesnake bites it results in a double puncture, or laceration that presents a smooth surface. They further testified that the puncture of a rattlesnake is like the injection of a hypodermic.

Mrs. James was buried and the investigation of James did not commence until some months afterwards, and, after he had applied for the life insurance due him because of her death. The companies refused to pay and suits had to be commenced. It was after the commencement of these law suits that he became the special subject of a most intensive investigation, conducted by the district attorney, aided by a dozen or more investigators attached to that office, working in concert with certain members of the police department and the sheriff's office. The officers rented a house next door, installed a dictaphone and commenced an investigation. After they had listened on the dictaphone for a few days, without any evidence of any homicide, they took the defendant into their personal custody and held him in detention in a private residence without any authority of law.

The defendant was taken into custody on Sunday morning, April 19th, 1936, about nine o'clock, after the dictaphone connection had been installed and was in operation in his residence. Nothing, however, is shown in the record to the effect that anything came over this dictaphone of an incriminating nature relating to the charge of murder.

I.

The Third Degree—The Alleged Confession (R. 1056 et seq.).

The investigating squad actively engaged in the case consisted of J. C. Southard in command, Charles Griffen, Chief Assistant of the Bureau of Investigation, Deputy Sheriff Willard L. Killion, and investigators Everett Davis, Harry Dean, John S. Martin and Earl E. Kynette. All of said officers were working together in relays day and night in forcing the defendant into a confession.

A.

Appellant Taken to Private House Instead of Jail.

On Sunday morning, April 19th, 1936, James was taken from his home at 3886 La Salle Avenue, by Southard, Griffen and Dean, district attorney's investigators, to the private house next door, 3882 La Salle Avenue (R. 1056). There the dictaphone planted by the officers for spying purposes was explained to him. This was done for its psychological effect. Southard said he took "quite a crowd" with him at the time he and the officers took James to the house and exhibited the dictaphone apparatus to him. A number of newspaper men, District Attorney Buron Fitts, Deputy District Attorney Williams, Officers Scott Littleton, Everett Davis and Harry Dean were among those present.

James was then taken to the office of Lieutenant Morgan where he was questioned for more than an hour (R. 1056). He was next taken to the district attorney's office (Sunday morning) where he was examined at great length and was called upon to defend himself against grave charges made by the officers. He had neither counsel nor friends present. No one knew where he was in custody or that he was under interrogation.

The California law prescribes a place in which persons charged with crime may be detained (R. 1057). A private house located in a residential part of the city and not complying with the provisions of law which provide the purpose and use of county jails and their management, is not a place where persons charged or suspected of crime may be lawfully detained. It is a violation of the laws of the State of California (Penal Code, Section 1597, *et seq.*, Section 145).

B.

Seventeen Days Without Warrant or Other Legal Process.

In the instant case the defendant was held in custody seventeen days, during at least the first two of which he was held incommunicado in the private house, without the issuance of a warrant and without being taken before a body which had power to examine the offense with which he was finally charged, and contrary to the express provisions of the Constitution and statutes of the State of California (R. 1057).

Early in the confinement of the defendant Officer Southard, in charge of all the investigating officers, committed an admitted battery upon the defendant (R. 1058). He and Officer Griffen were "working on the defendant" when Southard struck him, according to the latter's admission, in the face or on the side of the head. Southard had been an investigator for eight years and was seasoned to his task. James testified that he was ruptured during the time he was held incommunicado by the officers. A doctor who had treated James before he was in jail, and who saw him afterwards, testified that he was not ruptured at the time he examined him outside of jail, but that he was ruptured when he saw him in jail.

The third degree given to James consisted of at first depriving him of sleep, while officers in relays of four hours

each questioned him continuously (R. 1060). Physical violence was later exerted upon him. After thirteen days and nights of unremitting questioning he was taken from the jail on Saturday, May 2nd, and questioned from early morning until late at night without food. He asked for his attorney, Mr. Silverman (R. 487). The district attorney said he could not be found. He asked for Mr. Parsons, another attorney in the case. The officers refused to send for him, saying it would take too long to explain the case to him (R. 488).

Asked if James was informed that a charge of murdering his wife was under investigation, Southard answered: "I believe not." Attorney S. J. Silverman, who had been James' attorney in civil matters for some time and had heard that an attempt was being made to have James indicted for the murder of his wife, and James himself, testified that Silverman had instructed James to decline to answer any questions bearing on the alleged homicide except when Silverman was present. At any rate, James refused to talk after he was asked the first few questions and, according to Southard, he told Fitts "to go to hell" (R. 468-469). They kept right on questioning him (R. 470). Mr. Williams, a deputy district attorney, Griffen, and several other investigators were present. Southard said it *could have been possible* that they told him they had the goods on him. The arrangement under which James was "worked on" was that he was placed in a large chair, where he was compelled to sit for forty-eight hours, according to the admissions of Southard and other investigators, but, on the showing in the record, the questioning must have continued for sixty hours. The investigators worked in pairs of four-hour shifts. From sheer exhaustion the defendant several times fell asleep. Never less than two and as many as eight or ten officers were plying the defendant with questions at all hours of the night. James testified that

on May 2nd, at ten o'clock at night everyone cleared the district attorney's office and left him alone with Southard, the officer in charge who had admittedly beaten him.

James testified as follows:

> " 'A. I sat at the desk and he said to me, 'You have been sitting here lying to Fitts all evening just like you lied to me when I had you out at the house.' He said, 'I didn't have the dope on you then, but I have got it on you now', and he said, 'You are going to tell the truth here now or I am going to take you back to that house and I am going to beat your God-damned head off.' Q. Did you make any answer to that? A. I told him that I was ill from the beating that I had taken before, that I wasn't able to take another beating and that if he wanted me to say what he was relating to me in Hope's story there that I would gladly admit it and save myself other punishment' " (R. 497).

C.

The Confession Breaks at 1:45 A. M. After Days of Questioning.

The alleged confession began to break after days of unremitting effort, at 1:45 o'clock in the morning (R. 1057). No one, not even Mr. Silverman, the defendant's attorney, or Mr. Parsons, had knowledge of the place in which the defendant was held in private custody by the investigators. Neither his friends, relatives nor the public knew the place of detention. No warrant of arrest had issued and there was no public record, or any record, which would enable anyone not a member of the staff of investigators to know of or discover the presence of defendant.

D.

No Counsel Present.

The defendant, without being represented by counsel of his choice, whose presence he had requested for the

interrogation (R. 484), was subjected to the inquisition, in which a number of the investigators took part, and which was vigorously and unremittingly pressed, without delay, through many days and hours (R. 491 *et seq.*) (R. 1057).

E.

Description of Admitted Battery.

Officer Griffen described the battery committed on James as follows (R. 1058-1059; R. 477): He said he and Officer Southard were "working" on the defendant when Southard struck James in the face or on the side of the head. He said they began their four-hour assignment of questioning at four o'clock Monday morning. Everett Davis was present. They had not met with anticipated success. Jack Southard said: "Your wife Mary was a very sweet girl, very nice woman; she was well thought of by her friends; seems to have come from a good family and it is a shame she had to die the way she did in this pool out there." James replied: "She was not very much. She was a whore when I married her." Officer Griffen said that Southard was sitting in a chair opposite to James and he reached over and slapped him. Griffen then said to Southard: "Take it easy, Jack."

James testified that he had told Southard and Griffen "a hundred times," as they repeated Hope's rattlesnake story and the murder of his wife to him and used violent means to compel him to adopt it, that he didn't know what they were talking about and that it was because of his refusal to affirm Hope's story that he was struck. Griffen said that after James was "slapped" they continued to question him but he had no other violence inflicted upon him. Griffen questioned him the next night until one o'clock A. M. During all the time he was being held incommunicado he did not see James sleep (R. 1059). Jam s had then been

questioned, admittedly for forty-eight hours. There is evidence that it was longer. Griffen said James did complain about his ear, but he examined it and couldn't find anything wrong with it. When Griffen returned to the place of examination at nine o'clock, five other officers were with James. As 8:30 he was taken by Officers Kynette and Davis to Ninth and Alvarado streets. Griffen and Southard followed. At noon he was taken to the district attorney's office. Griffen did not recall whether James, when at the district attorney's office on the day he was taken into custody, had requested that word be sent to Mr. Silverman, his attorney, requesting his presence. He did not deny that this occurred.

On Tuesday he saw the defendant from seven o'clock to one P. M. At eleven o'clock he gave instructions to "book him" at the county jail, where he was committed to the "High Power Tank."

F.

Officers Work in Relays (R. 1057).

Southard admitted that the investigators operated in relays of pairs for a period of forty-eight hours. The defendant sat in a chair and was not allowed to remove his clothing (R. 1060). Several times he fell asleep from fatigue and exhaustion. Southard's statement as to what he said to James about his wife being such a beautiful little girl, etc., was given in the same words as Griffen's story. James' reply, being somewhat different in substance, we repeat it: " 'Aw, leave me alone and quit questioning me about her. She wasn't so much before I married her. She was only a little whore before I married her,' and I lost my temper and slapped him."

The defense contended that no such words were ever uttered by James at any time with respect to his wife and

and it was solely Southard's disappointment in failing to have broken James down by harassment, coercion and physical violence, to the state of accepting Hope's sensational story (which was a composite product of the detectives and investigators in collaboration with Hope) which irked Southard to the point of physical violence. Several disinterested witnesses and one or two officers testified absolutely that James' face showed black and blue and swollen spots which were plainly visible for several days after his arrest (R. 1060-1061-1062). He testified to terrible beatings he received in the private house in which he was detained and that his body was made black and blue from the waist up and that he had suffered a hernia or rupture from the roughing which he passed through. A physician who had examined his abdomen five months prior testified that he had observed no evidence of hernia at that time but an examination since his arrest clearly disclosed the existence of a hernia.

The late Mr. Justice Seawell of California, in his dissenting opinion, said (R. 1061 *et seq.*):

> "The prosecution called a few witnesses connected with the official staff who testified they did not observe any bruises on the defendant's face, but, in the main, their testimony was more in avoidance of direct and positive answers which should have been given by officers of the law. There can be no possible doubt, as testified to by one or two of the officers themselves, and by independent parties, that the defendant's ears bore marks and bruises which anyone at all observant should have seen. James said he was practically made hard of hearing by the head beating he had received from Southard and Griffen, and that his body was black and blue from the waistline upwards. Despite the admissions of the several officers who were most active in conducting the plan of continuous questioning, that James fell asleep several times while being quizzed, from sheer fatigue and exhaustion, nevertheless sev-

eral of said officers testified, as astounding as it seems, that James was at all times exceptionally cool and calm and showed no signs of mental distress or fatigue, and was actually *in better physical condition than any one of his inquisitors.* And this, too, in spite of the fact that the questioners worked in pairs on four-hour shifts while James admittedly was carried through a sleepless ordeal of not less than forty-eight hours, but more probably sixty hours, with as many as eight or ten investigators plying him with questions. As example of the evasiveness which characterized the testimony of the investigators generally, we quote from Jack Southard, acting chief of inspectors, as to James' physical appearance at the time of private custody by said officers, to the proper place of detention, the county jail. 'Q. Did you notice any marks or bruises upon his face or head when he was taken into custody? (delivered into legal custody at the county jail.) A. Not that I *recall.* Q. Well, you did notice marks and bruises upon his head when you took him to the county jail, didn't you? A. No, I don't *believe so.* Q. Weren't both of his ears bruised and swollen at that time? A. *They were not.* Q. Neither *one of them?* A. That I *wouldn't say;* one may have been; I *wouldn't be positive.* I know that *both* were not. Q. As a matter of fact you know that one was, don't you? A. I do not. I saw that one in court. Q. You saw the bruises here when he was in court? A. The left ear was a little bit swollen at the top. * * * Q. He was pretty well worn out when he got to jail, wasn't he? A. I couldn't tell you.' (Emphasis supplied.) He fixed the time he observed the bruises he was then testifying to as of the day he was before the grand jury on the incest charge. The foregoing equivocal testimony as to bruises that were visible on the defendant's body is characteristic of the testimony of the officers in whose personal custody the defendant was held for approximately two weeks. Why he was thus held incommunicado has not been and cannot be accounted for by any theory, except the practically admitted one of forcing the defendant, by the use of physical and intense men-

tal punishment, into making a confession corroborating the unnatural, weird and astounding statement which was in the hands of the investigators and commonly referred to as Hope's story or confession. On cross-examination Southard was asked these pertinent questions to which objections were sustained on the ground that they were immaterial: 'Q. Now, Mr. Southard, when you arrested the defendant why didn't you take him before a magistrate? (Objection sustained.) Q. The reason you didn't take him before a magistrate at once was because you wanted to get a confession from him, wasn't it? (Objection sustained.)' Southard said he gave instructions that James was not to be left alone at any time; one or more investigators was questioning him at all times; some questions he answered and some he refused to answer; he would just sit and look blankly. Southard testified that he had three meals a day but James testified that he was practically starved into a state in which he told the investigators that he would answer any question in any way that the investigators wanted him to answer it. It is the admitted fact that he was interrogated by the district attorney and his assistant, Mr. Williams, at all hours of the night, for as many as two and a half to three hours. One period continued from one o'clock to six o'clock. The officers also took part in interrogating the defendant. The plan adopted was that the investigators worked on the defendant to a point where it was deemed expedient or advisable to take him before the district attorney, and if satisfactory progress had not been made he would be returned to the private custody of the investigators for the employment of such methods as would work a change of mental attitude on the part of the defendant. No other possible answer could be made to their unauthorized action which only ended with the procurement of the alleged confession. At times numerous officers would be present and sometimes, James testified, he was left with but one officer. The evidence adduced by the prosecution affirmatively shows that the defendant was shifted back and for-

wards in the manner herein described many times at all hours of the day and night, continuing over a long inquisitorial period. At times Hope was brought into the room, and engaged James in controversial disputes.

"Officers Killion, Gray, Griffen, Littleton, Davis and Southard were most active in procuring the alleged confession of James. The first signs of a confessional collapse, as told by Killion, occurred at midnight, May 2nd, thirteen days after James was taken into custody. At the above hour, in the room adjoining the district attorney's office, James said to Killion, 'Why don't we go out and get something to eat, and I will tell you *the story.*' The conference began at about one in the afternoon and ended at about 2:30 or three o'clock the following morning—a short intermission having been taken for coffee and sandwiches. The reference to 'the story' explains the purpose uppermost in the minds of Killion and Gray and accounts for James being in their exclusive custody at the midnight hour instead of being in jail. Killion's reply to James' proposition was, 'All right.' Killion and Gray then took the defendant to a restaurant at 5th and Figueroa. Killion said he once wrote shorthand. The notes he used to refresh his memory were, to use his words, 'some in shorthand, and some in longhand, and some in scribbling.' They seemed to have been entered in desultory order in a book and covered thirty-one pages, all of which he said he took during the time he and Gray had James at the restaurant. They had a steak dinner and Killion bought James a cigar and James said, 'Now, you want to have this story,' and Killion said 'Yes.' James said, 'All right; there is no hurry, is there?' Killion wanted him to go back to the office (where the district attorney, his deputies and the investigators were waiting) but James said, 'No, this is all right, isn't it?' Killion replied, 'Sure, it is all right.' James testified at the trial that practically everything he told Killion, Southard and the district attorney concerning the death of his wife was the story which the investigators had drilled into him for hours for several days. He said he was not able to stand

further beatings and physical punishment with which he was threatened; that if he gave an answer to a question which did not suit the questioners he was struck on the head. He had also received one or two terrific beatings at the hands of Southard and Griffen; he would have preferred death rather than be returned to the private residence, which the officers threatened to do, where most of the punishment was inflicted. The story he told Killion had been repeated a 'thousand' times to him; for days when they repeated to him Hope's story he told the officers that he did not know what they were talking about until he was finally coerced into submission.

"James said he was not beaten or struck in the presence of the district attorney or his deputies, but when he was taken back to the private place of detention, without the hearing of any person save his accusers, he was beaten when he refused to answer, and also for refusals to give answers which were not acceptable to his questioners. Southard admitted that in the early stages of his confinement he refused to answer certain questions. In fact Southard said he told Mr. Fitts on one occasion to 'go to hell.' • • • he changed his mind after spending two days in private detention and the balance of the time in the 'High Power Tank.'

"We now come to the proceeding in which it is claimed that James admitted or affirmed the truth of Hope's story by failure or refusal to deny the same under the well-known rule that where one is directly charged with the commission of a crime silence on his part or failure to deny the accusation may be received in evidence against him.

"On May 2nd, at 11:45 a. m., the defendant was taken into the 'Chaplain's' room at the county jail and Hope's confession or statement was read to him. Mr. Lynch, the statement reporter of the sheriff's office, reported the full proceeding. James was brought into the room by Officer Killion. Mr. Williams, Deputy District Attorney, was seated directly opposite James

at a table about three and a half feet in width. Officers Southard, Griffen, Killion and Gray were seated across the table from James. Hope was also present. The reporter's notes do not show that the defendant was advised by anyone as to his rights and no showing was made that he was not under duress or as to what was done or said by way of inducement or fear of punishment immediately prior to the statement. Hope was present and the proceedings were begun by Mr. Williams asking the defendant the following question: 'Q. James, do you know this man, Chuck Hope? A. Yes, I know him. Q. Now, Chuck Hope told us this morning that on the 4th day of August, the day before your wife was killed, etc. (Here follows two pages of a summarization of Hope's accusatory statement which was read to the defendant.)' At the conclusion of the statement Mr. Williams added: 'He makes that statement. Have you got anything to add to it?' By Mr. James: 'A. Nothing—that is all.' "

The late Mr. Justice Seawell of the California Supreme Court added:

"It certainly would require a reversal of the cardinal rules of criminal law that all inferences and presumptions and intendments of law are to be resolved in favor of innocence, to hold, in the face of James' experiences as shown by the record, that a failure of the accused to *add* to the accusations made by Hope should be taken as an implied admission of guilt. The defendant had been confronted with the accusations of Hope at every hour of the day and night for several days and he refuted them until he finally yielded at the midnight supper. Would the average person have done otherwise than to have refused to attempt to *add* to Hope's story of monstrous deeds? In all fairness, should not James have been advised as to the legal effect of his failure to add anything to Hope's story?

"It will be noted that the statement to Killion and Gray was not taken in stenographic form. Killion said

he took it in shorthand, longhand and by 'scribbling.' It is in narrative form and bears no semblance to a stenographic report and is in the third person. When immediately taken before the district attorney no effort was made to advise defendant of his rights. In fact it is admitted that he requested that one or both of his attorneys be communicated with. If either or both were not available at the particular time, it was sufficient notice to the prosecution that the defendant was asserting his statutory rights which could not be nullified by unduly hastening an inquisition not provided by law. It is always the duty of the law's representatives to give all reasonable assistance to the enforcement of an accused's statutory rights.

"It may be noted that during the period of intense questioning which continued throughout several days, no statement reporter was present to report the methods by which the confession was attempted to be induced. It is the claim of the defense, and ample evidence supports the contention that the alleged confession followed a long course of deprivation and physical mistreatment of a prisoner held incommunicado. It was only when the time was deemed ripe for a confession that a reporter was called to report the proceedings and in no instance were the preliminary things done and said which caused or forced the alleged voluntary confession, made to appear as a part of the report. These important matters, so far as referred to at all, rest in parole. Neither was the defendant properly advised as to his rights or permitted to have independent advice or counsel at the times when the exercise of such rights would have been of benefit to him. The law casts the burden upon the prosecution to show that the confession of guilt was freely and voluntarily made without the exercise of duress, fear, force, or physical or mental cruelty, or hope of reward, or immunity from punishment.

"It is true that several officers testified in terms of conclusions that no violence was inflicted upon the de-

fendant or promises of immunity were made to him in their view or to their knowledge, but this does not meet the situation. Some were not called to testify and others may not have been present at the times physical punishment was used. From the record before us the conclusion is irresistible that unlawful means were employed by concert of action from the first to the time defendant made the alleged Killion statement to force a confession. The burden cast by law upon the People was not met. The case of *People* v. *Dye*, 119 Cal. App. 262, 269, 273, is directly in point here. Dye was convicted of murder of the second degree. The defendant, being suspected of murder, was taken into custody and confined in the Beverly Hills police station after the same fashion as the defendant here was held in custody by the officers at a private residence. Precisely the same kind of methods—though by no means as extreme—were adopted there to coerce a confession from the defendant as were adopted in the instant case. Mr. Justice Conrey, then Presiding Justice of the Second Appellate District, Division One, District Court of Appeal, was the author of the opinion which reversed the judgment of conviction and the order denying a new trial.

"In discussing the methods by which the confession was procured, the late Justice Conrey said in part: 'It shows a persistent questioning of the defendant about various matters, many of which related to the tragedy • • • including a direct charge, which the defendant denied • • • During the night the defendant became weary and sleepy (in the instant case he became not only sleepy but fainted) but the questioning went right on. Officer Gray admitted that twice he told defendant 'to sit up in his chair'; that the defendant 'may have been nodding; he was not asleep.' In view of the inquisition that was going on, and the condition of the prisoner, these orders were in effect a kind of coercion. The circumstances of the questioning and the method thereof, were well calculated to force a con-

> fession of guilt, but the process was not at that time successful. It was only after six hours more of questioning * * * followed by three days more of secret imprisonment that the confession was finally obtained * * * Considering the wearing-out process of inquisition, the secrecy of the imprisonment, the isolation of the defendant and the unlawful failure to take the defendant before the magistrate (Pen. Code, secs. 821, 824, 849 and 145) the transaction has all the earmarks of a deliberate attempt to force a confession by every means short of promises, direct threats or actual violence. (In the case at bar a direct act of violence in at least one instance is admitted. As to others the evidence is quite convincing.)"

At midnight on May 2nd, 1936, thirteen days after James was taken into custody, and unremittingly questioned in a room adjoining the district attorney's office, without his counsel being present, James said to Killion, "Why don't we go out and get something to eat, and I will tell you the *story*." The alleged confession was started about 1:45 A. M., and was not completed until 3:00 or 3:30 in the morning.

James was indicted on May 6th, three days later, and on May 11, entered a plea of not guilty to the charges. At no time subsequent to this midnight and early morning session, when he was in the exclusive custody of the district attorney and his deputies, and investigating officers, and without the presence of his counsel or any friends, did James ever repeat the alleged confession which was subsequently offered in evidence against him.

At the outset of the trial, which commenced on June 23rd, 1936, Charles H. Hope, represented by a public defender appointed by the court, entered a plea of guilty and his sentence was deferred until after this trial.

II.

The Bringing of the Rattlesnakes Into the Courtroom During the Progress of the Trial of the Case.

Hope received a lighter sentence as a result of his plea of guilty and his testimony against the appellant, which he has since repudiated and branded as false. He testified that he bought two rattlesnakes from "Snake Joe" Houtenbrink at Pasadena, which he delivered to the defendant, and that the defendant placed his wife's foot in the box containing a snake, while he, the defendant, held her foot with his left hand. The snake was supposed to have struck the great toe of her foot, which had on it but a single laceration. A snake has two fangs, as shown by the testimony of experts who testified fully and voluminously in the case.

"Snake Joe" Houtenbrink was put on the stand and while he was on the stand argument arose between counsel over the proposal of the prosecution to bring into the courtroom two snakes in two boxes. The objection was overruled. The snakes were thereupon produced in court, whereupon defense counsel made the following objections:

Defense Objections to Rattlesnakes (R. 200-204, *et seq.*)

"Mr. Clark: If the Court please, I object to the witness leaving the stand for the purpose of looking at the box that has been brought into the courtroom, or for any other purpose. I object to any snakes being exhibited or introduced into this case. I think this is an appropriate time for me to ask your Honor either by statement of your Honor or some appropriate means to make it appear in the record that two men have just entered the courtroom carrying a box covered with a burlap cloth, and upon their coming down the aisle, the people who were in the courtroom, filling the courtroom, manifested excitement, that several of them rose from their seats, that the attention of spectators and the jury were directed away from the testimony of the

witness, that at the time I am speaking there is upon the faces of the audience an appearance of anxiety and consternation not heretofore exhibited during this trial.

"The Court: The Court has no knowledge that there was such manifestation on the part of the audience. The Court is unable to state whether the attention of any person was diverted or not, nor is there anything to indicate the apprehension that your statement implies; at least, it has not been seen by the Court.

"Mr. Clark: In other words, your Honor has no knowledge that the statement I have just made is correct?

"The Court: No. That may be your frank, honest opinion as to the facts; however, the Court has not seen any such situation.

"Mr. Clark: I will try to find appropriate means of putting those facts in evidence. I think that they are facts and that my statement is appropriately made at this time.

"The Court: So far as the physical facts of the two men having taken the box in from the courtroom door and passed up the aisle between the two groups of spectators, through the gate into the inner part of the courtroom and deposited the box by the side of the bench, the record may show that that did occur."

Description of Wave of Terror on Bringing in of Snakes.

On motion for a new trial, R. E. Parsons and Wm. J. Clark, defense counsel in the case, filed the following affidavits describing the courtroom scene of the bringing in of the rattlesnakes (R. 822):

"R. E. Parsons, being first duly sworn, and upon his oath, deposes and says: That he is one of the attorneys in the above entitled matter and that as such he was present during the course of the trial of the above named defendant in Department 43 of the above entitled court and that upon one occasion during the course of the trial and while testimony was being

taken, affiant heard a commotion in the rear of the courtroom and upon looking up saw one of the investigators of the District Attorney's office of this County, and who had been working in and upon the preparation of this case and who, from time to time had been sitting at the counsel table during the trial of this case, entering the court room with another gentleman and the two of them were carrying a box, which box was approximately a foot square and about five feet long and one side was made of glass so that upon looking into the glass one could see the entire inside of the box, and there within the box, were two live rattlesnakes commonly known as 'diamond back', and affiant could hear the rattle of these snakes, notwithstanding the proceedings within the court room were then actually being carried on as these men entered the court room with the box containing the two live rattlesnakes.

"That there was considerable commotion within the court room and affiant as he turned about the court room, saw numerous people partially arising from their seats and looking in the direction of the two men who were carrying the box of live rattlesnakes within the court room; that affiant could hear numerous comments made by persons within the court room which remarks were, however, made in an undertone and affiant could not tell exactly what the spectators within the court room said, but affiant noticed the jury, immediately upon the entering of the court room by the District Attorney's investigator and the other man, who were carrying the box of live rattlesnakes directed their attention from the actual proceedings then taking place within the courtroom, and the eyes of the jurors were immediately centered upon the two men who were entering the courtroom with the box of rattlesnakes; that the box of rattlesnakes was taken to a position in the courtroom immediately behind the clerk's desk and the box was set down and at a later time this same box of rattlesnakes together with the two rattlesnakes therein contained, was offered in evidence by the People over an objection of the defendant, and thereupon said box of rattlesnakes, with the glass por-

tion thereof turned toward the jury, was placed upon the counsel table at a position approximately four or five feet from the front of the jury box, and affiant noticed that the attention of the jury was thereupon attracted to and centered upon the said live rattlesnakes which were then contained in said box and which were exhibited to the jury as aforesaid."

"Wm. J. Clark, being first duly sworn, deposes and says (R. 828): I am one of the attorneys for the defendant and was one of the attorneys that represented him at the trial of the above entitled cause. There was a strong public sentiment against him before the trial commenced. It was so strong that serious consideration was given to the question as to whether a motion should be made for a change of venue, when a jury was selected I suggested to Hon. Chas. W. Fricke that the jury be locked up during the trial but it was not so ordered and the jurors were not removed from contact with the public nor prevented from reading the papers except that they were admonished not to do so.

"All the daily papers, of which there were four, namely, the News, the Times, the Herald and the Examiner, carried daily stories unfavorable to the defendant and each day the court room was filled with an unfriendly audience, while from twenty to sixty persons were waiting in the corridors almost throughout the trial.

"There was the testimony of one Charles Hope that he had procured rattlesnakes at the solicitation of the defendant and the latter had thrust his wife's foot into a box containing one of them. As the testimony of said witness appears at length in the reporter's transcript it is not deemed necessary to quote from it here. He did say, however, that the snakes were returned to the man from whom he bought them.

"On the 29th day of June the District Attorney, acting through his deputies Eugene Williams and John Barnes, committed such misconduct as inflamed the passions of the jurors against this defendant and prevented him from having a fair trial.

"On said day the District Attorney, acting through said deputies, for the purpose of inflaming the minds of the jurors, caused to be brought into the courtroom the said two rattlesnakes. The said snakes were in a box which was carried down the aisle of the courtroom, every seat of which was occupied. The snakes were alive and sounding their rattles. A wave of terror—I can find no other language more accurate—swept through the courtroom. Spectators rose from their seats. Some nearest the aisle shrank away. Many uttered exclamations of fright.

Newspaper Description of Scene.

"The scene as described by a reporter of the Herald-Express was as follows (R. 828-829):

" 'Buzzing their hollow rattles so loudly that women in the crowded courtroom shivered and shuddered at the eerie, frightening sounds, two diamond-back rattlesnakes glittering in their new skins today were placed on the counsel table in Superior Charles W. Fricke's court, where Robert S. James, Birmingham barber, crouched ghost-faced and jittery at his trial for the murder of his golden-haired bride, Mary.

" 'Paraded across the courtroom in a velvet covered, venom splashed, 5-foot glass cage, two deadly diamond-back rattlesnakes late today hissed and shook their hollow rattles eerily, and struck out with their evil wedge-shaped heads, as they were exhibited less than 2 feet away, before the fascinated eyes of 10 men and 2 women who made up the jury trying Robert S. James for the murder of his golden-haired wife, Mary.

" 'The reptiles had just been identified by Snake Joe Houtenbrink as Lethal and Lightning, two guaranteed 'hot' snakes he had sold to Charles H. Hope, hard talking ex-sailor, the day before Mrs. James was slain by drowning in her bathtub in her La Canada home.'

"The Examiner reporter gave the following description of the scene (R. 829):

" 'Man's enemy from primordial ages, the snake, yesterday was made the living, visible symbol of the Robert James murder case. The diamond-backed rattlesnakes hissed and struck before the trial jury as a long glass box was borne forward like a hideous offering of a black ritual.'

"I was standing with my face toward the jury at the time. I noticed some of them gave a kind of gasp almost at the moment I noticed the consternation of the audience. Some of the spectators, however, rose to their feet. Many of them made audible exclamations. Those nearest the aisle, shrank away. I made a protest at the time because of the obvious effect which the bringing of the snakes into the court room had upon the spectators who were there.

"I am informed and believe, and therefore state the fact to be, that the bringing of the rattlesnakes into the court room in the manner described had such effect upon the minds of the jurors as prevented them from giving fair consideration to the evidence thereafter introduced by the defendant. The source of my said information is a newspaper article containing alleged interviews with members of the jury, none of whom have publicly, or so far as I know at all, denied the statements attributed to them.

Jurors' Views of Effect of Bringing in of Snakes.

"The said interviews were published in a daily newspaper of large circulation, to-wit: the Los Angeles Examiner, of July 25, 1936, and I quote from them as follows (R. 830):

"Harold W. Hart, one of said jurors, said:

" 'James had been convicted in my own mind ever since they brought the rattlesnakes into the courtroom, showed them to us, and then introduced witnesses who told us that James had actually stuck his wife's foot into a box containing one of those serpents and had watched it strike her.'

"Mrs. Ollie Sype said:

"'The sight of the rattlesnakes which were exhibited as the weapons by which Robert James did his wife to death stunned me. It was the most shocking experience of my life.' * * *

"Thereafter, the District Attorney, acting through his said deputies, committed further misconduct which prevented a fair trial of the cause. I am informed and believe that on the 15th day of July, 1936, during the noon intermission, one A. Pierce Artran was present in the court room at the request of the District Attorney. He did not testify in the case and was not sworn as a witness but during the said intermission, according to my said information and belief, he opened the box containing said rattlesnakes and was holding one with a forked stick, demonstrating to those who were present the mouth and fangs of said snake, when it escaped from him and slid under a bookcase in the court room, in which there were a large number of spectators. That the said snake was loose in the court room for a considerable period of time and was not returned to its box until nearly time for court to convene. The sources of my said information are the newspaper articles of July 15, 1936, and July 16, 1936, published in the papers above referred to. I also received information from the Clerk, Mr. Arthur Moore, casually, that one of the snakes had been out of the box, which information was a brief affirmative reply to a hurried question on my part. I was also so informed by my associate, Mr. Russell E. Parsons, who, as I understand, was not present, and received his information from others. And I was also so informed by a Mr. O'Brien, who is employed by Mr. Parsons, and I received similar information from a number of others. I was informed by Mr. O'Brien, and others whose names I do not now recall, that persons whom they thought they recognized as jurors passed through the courtroom during the time when the rattlesnake was out and before the excitement which it caused had subsided.

"The presence of the snakes in the courtroom proved nothing. They were not brought into the courtroom for the purpose of proving anything. There is no evidence as to one of them that it was ever in the vicinity of the deceased, Mrs. James; and there was no attempt to identify either one of them as the rattlesnake which it was claimed did strike Mrs. James. The snakes were produced for the effect that two live rattlesnakes —any two live rattlesnakes—would have upon the jury. Any other two rattlesnakes would have served the same purpose."

Houtenbrink later was made a "clerk" of the court for the purpose of having custody of the snakes, which were labeled "Exhibit 20" in evidence (R. 212), and many experts were called to testify as to the life, habits and habitat of snakes, and experiments conducted on snakes by these reputed experts.

Eugene A. Williams, a deputy district attorney of Los Angeles County, trying the case, filed an affidavit which this counsel stipulated could be included in the records herein (R. 1116), in which Williams admits that two live rattlesnakes were brought into the courtroom, stating that they were brought in for the purpose of being identified and were identified as the identical snakes sold and delivered to the defendant Hope (R. 1116). The affidavit admits that "snakes were brought into the courtroom in a glass case covered with a cloth so they could not be seen, and were offered and received in evidence as soon as was conveniently possible after having been brought into court."

The affiant denies that he brought the snakes into court "for the purpose of inflaming the minds of the jurors," but states that they were brought into court and offered and received in evidence and that they "were instruments actually purchased for the purpose of killing the victim and one of which was actually used in an effort to do so."

The affidavit further denies that to his knowledge there was "any wave of terror or exclamations of fright," and states, "nor was there any extraordinary or unusual commotion among the spectators, and none among the jurors. The only reaction of the audience observed by affiant was the natural curiosity caused by the rattling of the snakes and the desire of some of the spectators to see what was causing the sound. The entire matter of bringing the snakes into court and dealing with them in the presence of the jury was handled in as unostentatious a way as was possible, and affiant personally suggested that the snakes should be removed from the courtroom as soon as was reasonably convenient after they had been exhibited to the jury."

Deputy Williams further averred that he thought it was his duty to bring the snakes into the courtroom and exhibit them to the jury (R. 1117).

The affiant further states that one of the rattlesnakes was removed from its box during the noon hour, and that this was done at the request of the deputy district attorney in order to examine the mouth and throat of the snake for the purpose of determining its physical condition. The affidavit admits that this examination was in the courtroom, but denies that any members of the jury were present. It states that after the examination the snake was returned to the box in the courtroom.

One doctor, Dr. Gustave Boehme, testified to experimenting upon guinea pigs with the venom of two rattlesnakes, one of which it was claimed by the State, was one of those belonging to Houtenbrink (R. 109, 115).

III.

The Production of Evidence From Colorado Having No Bearing on This Case on Trial, Without Notice and Without Opportunity to the Defendant to Defend Against the Same.

During the trial of the case the prosecution, over strenuous objections (R. 257-263), produced in evidence a number of witnesses from the State of Colorado, more than one thousand miles away, to testify to the death of a former wife, Winona James, who was seriously injured in an automobile accident in 1932, when the defendant and she were riding down Pike's Peak Highway in Colorado (R. 263, 323, 338, 360, 377, 385, 391, 397, 447). The victim had not died from the injuries of the automobile accident, but was taken to a hospital, where she was treated and was conscious for three weeks, and where she made no complaint against the defendant. The hair of her head was matted with blood as a result of the accident, and she was warned, according to the testimony, not to bathe because of the danger of removing the matting. Nevertheless she did bathe and was found drowned in the bathtub. This testimony was offered and produced by the state for the purpose of showing that her death was not the result of accident, but was deliberately planned and executed by defendant to collect insurance. No connection was shown between that case and the case for which the defendant was placed on trial and convicted.

Over vigorous objections of the defense several witnesses were produced by the district attorney from the State of Colorado, and these witnesses testified to alleged events four years before. It was contended by the defense that the admission in evidence of the large amount of testimony from Colorado deprived him of due process of law in not

having notice that he would have to meet this evidence or being given opportunity to meet it.

During the taking of the testimony starting the Colorado matter defense Attorney Clark made the following statement to the Court and the following objections:

> "We are in receipt of information that warrants the belief on our part that by taking depositions in Colorado Springs, Colorado, we can contradict some of the facts deemed material here, testified to by the witnesses for the prosecution, and particularly that we can contradict the testimony of Mr. J. D. Rogers concerning the apparently intoxicated condition of Mrs. James, and we move for a reasonable continuance to give us an opportunity to take the deposition of the witness who has communicated with us and such (fol. 1871) other witnesses as we may find at Colorado Springs * * *" (R. 684).

Robert S. James, recalled on *voir dire* examination, and testified as follows:

> (fol. 1872) By Mr. Clark:
>
> "Q. Mr. James, I hand you a letter and envelope, and ask you if they came into your possession during the course of this trial?
>
> "A. Yes.
>
> "Q. And directing your attention to the envelope and the post mark, 'June 24th,' when, with relation to that date, would you say that you did receive that?
>
> "A. I received it when I went back to my tank one day last week.
>
> "Q. And at the time you received it was the letter in the envelope?
>
> "A. Yes, sir.
>
> "Q. Now, do you recognize the writer of the letter as any one you knew in Colorado?
>
> "A. I remember the man at the top of the Peak that day. My wife and I visited him just before he left the top of the mountain.

"Q. Did you remember his name before you received the letter?

"A. I don't believe I would remember his name, unless he called my attention to it in the letter.

"Q. And he called attention to it in the letter?

"A. Yes, sir.

"Q. And upon receiving the letter did you hand it to me as soon as you had an opportunity to do so?

"A. I did.

(fol. 1873)

"Q. Now, do you recall any of the other people that you saw either at the Peak, or at the scene of the accident that occurred after you left there, who have not been here in court?

"A. Do I recall any of them?

"Q. Yes.

"A. Well, right off hand I don't think I do.

"Q. During the time that your wife was in the hospital, was she conscious?

"Mr. Barnes: Just a minute. I object to it on the ground that this is a showing with respect to the matter about which we have just been talking.

"Mr. Clark: Why, surely. The purpose is to show that prior to her death Mrs. James was conscious, and that he had tried to get other names so that we might proceed to take their depositions, and prove by them that she never claimed that this defendant assaulted her. That is the purpose of the question • • •

"By Mr. Clark:

"Q. Was Mrs. James conscious while she was at the hospital?

"A. She was conscious the next morning at 7:00 o'clock.

"Q. And she remained conscious until the time of her death?

"A. She did.

"Q. Do you know the names of the nurses who attended her?

(fol. 1875)

"A. No, I don't remember their names now.

"Q. Do you know of any visitors that she had after the accident, either at the hospital or at the house?

"A. Well, her father visited her.

"Q. Where is he now, do you know?

"A. He is in Fargo, North Dakota.

"Q. Any one else.

"A. Mrs. Yarnell and her two daughters visited there.

"Q. That is the daughters that have testified here?

"A. Her daughter. Her mother is in Colorado Springs.

"Q. Do you remember any others?

"A. Well, the Doctor that attended her was there every day.

"Q. Who was the doctor?

"A. Well, I heard his name the other day, but I don't remember his name now. If you told the name I would know.

"Q. May I offer the letter and envelope?

"The Court: Mark it Exhibit A on the motion.

"Mr. Clark: I have nothing further to present, your Honor.

"Mr. Williams: I have no question.

"A. Is that all?

(fol. 1876)

"The Court: Just one question, Mr. James: You referred to the daughters of Mrs. Yarnell. Was it one of the daughters that testified here?

"A. That was one of the daughters.

"Q. She was one of the daughters that visited your wife?

"A. Yes, sir.

"Mr. Barnes: We resist the motion, if the Court please, on the ground that there is no proper showing made, and all the evidence except that referred to in the letter, is merely cumulative, the witness Yarnell having testified in effect that the wife was conscious and nobody has suggested anything to the contrary, and as a matter of fact, there is no showing what the other witnesses may testify to.

"The Court: May I see the letter?

"Mr. Williams: Now, as far as the matters contained in the letter is concerned, it is a matter which may or may not have any significance. Even as indicated in the letter, it is indicated that the victim, Winona James, could have been drunk at the time of the accident. In addition to that, this matter was called to the attention of the defendant and apparently it was brought to the attention of the Court in the middle of last week—

* * *

(fol. 1878)

"Mr. Clark: If your Honor please, this defendant has not been shown in this case to be a—there is no reason for counsel for the prosecution taking that stand. He has brought into this court evidence of another offense which it is claimed took place more than four years ago, more than a thousand miles from the court room. Isn't the right of the defendant to have a trial by a jury of those in the county, which means in the community. That constitutional right exists by reason of the very great law that if justice be done, the defendant is entitled to bring his witnesses into the courtroom. It is true that counsel advised us of their intention to offer this evidence. It is also true that we were firmly convinced that the evidence could not be gotten under any conceivable set of facts, and being so convinced, we had no reason to anticipate that your Honor's views would differ from ours——

"The Court: I don't think you are really right on that, Mr. Clark. If you wanted to do it you should have said, 'We have the testimony and we want a continuance to get it.'

(fol. 1879)

"Mr. Clark: Well, outside of the burden of a strenuous trial, where counsel have the responsibility of a man's life upon their shoulders, they can do just one thing at one time. They have to concentrate on all the facts that are being produced. Among the three counsel who are representing the defendant here we could not be expected to go to Colorado Springs. If we had the time and the money perhaps we could do that. Those things we have not, and we had no need for

the deposition until we reached this stage of the case. I will take the broad position that where, as here, an attempt is made to prove the issues of another crime largely separated from the place of trial, and largely separated from the time of trial, that when that attempt is made then the defendant has a right to a reasonable continuance in order to get that evidence which he cannot reasonably get now, and which he should have. He doesn't know from the Indictment that he was going to have that evidence to get." (R. 684, 685, 686, 687, 688, 689.)

Thereafter the Court denied the defense motion for a continuance (R. 690).

IV.

Hope's Affidavits that His Testimony was Perjured and Known to the Prosecuting Officers to be Perjured Vitiates and Nullifies the Entire Judgment Under the 14th Amendment to the Constitution of the United States.

Since the trial Charles H. Hope has repudiated his testimony and his alleged confession, stating that it was false and induced by third degree methods, and that it was known to be false to the prosecuting officers. His affidavits filed in the court in this case have failed to secure official action setting aside the judgment which the affidavits show was based on perjured testimony (R. 920, *et seq.*).

Summary of Points Relied Upon.

I.

PROCEDURAL DUE PROCESS OF LAW WAS VIOLATED BY THE USE IN EVIDENCE OF A PURPORTED CONFESSION OBTAINED FROM THE DEFENDANT MAJOR RAYMOND LISENBA, THROUGH THIRD DEGREE BRUTAL METHODS. THE APPELLANT WAS SUBJECTED TO PHYSICAL VIOLENCE AND PROLONGED AND INCESSANT QUESTIONING WITHOUT SLEEP AND UNDER TORTUOUS MENTAL ORDEAL SIMILAR TO THAT EMPLOYED IN THE DARK AGES AND IN THE TORTURE CHAM-

BEE, FOLLOWING WHICH, STATEMENTS WERE EXTORTED AND COERCED FROM HIM AND PERMITTED IN EVIDENCE IN THE TRIAL. THE USE IN EVIDENCE OF SUCH ALLEGED CONFESSION OBTAINED BY SUCH MEANS AND METHODS MAKE VOID THE ENTIRE TRIAL UNDER THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND DENIES TO THIS APPELLANT THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II.

DURING THE TRIAL THE PROSECUTION BROUGHT TWO LIVE, HISSING, WRITHING RATTLESNAKES INTO THE COURTROOM AND PLACED THEM BEFORE THE JURY. THE RATTLE SNAKES HAD NO EVIDENTIARY VALUE. USE OF DEMONSTRATIVE EVIDENCE IN A CRIMINAL TRIAL WHICH ONLY SERVES TO INFLAME THE PASSIONS AND PREJUDICES OF THE JURY VIOLATES DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

III.

NUMEROUS WITNESSES WERE BROUGHT FROM ANOTHER STATE WITHOUT NOTICE TO THE DEFENDANT, AND HE WAS IN EFFECT PLACED UPON TRIAL IN CALIFORNIA UPON A PURPORTED OFFENSE ALLEGED TO HAVE OCCURRED IN COLORADO, WITHOUT ANY INDICTMENT, INFORMATION OR JUDGMENT THEREON AND WITHOUT ANY JURISDICTION OF THE CALIFORNIA COURT OF THE SUBJECT-MATTER THEREIN, AND WITHOUT ANY OPPORTUNITY TO THE DEFENDANT TO HAVE THE PROCESSES OF THE COURT TO PRODUCE WITNESSES IN HIS BEHALF OR TO PREPARE A DEFENSE AGAINST SUCH ACCUSATION, SUCH OFFENSE BEING IN NO WAY CONNECTED WITH THE ONE FOR WHICH HE WAS ON TRIAL. SUCH EVIDENCE CONSTITUTED A LARGE PORTION OF THE PRESENT CASE AGAINST APPELLANT AND ITS USE IN THIS CASE WAS A VIOLATION OF DUE PROCESS

OF LAW AND THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

IV.

THE PRINCIPAL TESTIMONY AGAINST THE DEFENDANT WAS THAT OF AN ALLEGED ACCOMPLICE NAMED CHARLES H. HOPE, WHO RECEIVED LENIENCY FOR HIS TESTIMONY. TO BE SUFFICIENT UNDER THE LAWS OF CALIFORNIA IT HAD TO BE CORROBORATED AS REQUIRED BY SECTION 1111 OF THE PENAL CODE OF CALIFORNIA, AND THERE WAS NO CORROBORATION. SINCE THE TRIAL THE SAID CHARLES H. HOPE HAS MADE AFFIDAVITS AND FILED THE SAME IN THE SUPERIOR COURT OF LOS ANGELES COUNTY, STATING THAT HIS TESTIMONY WAS OBTAINED BY DECEIT, FRAUD, COLLUSION AND COERCION AND WAS ENTIRELY FALSE; THAT HE WAS IMPELLED BY FORCE AND FEAR, THREATS AND PROMISES, AND THAT ALL THESE FACTS, INCLUDING THE FALSITY OF HIS STATEMENTS, WERE KNOWN TO THE PROSECUTION AND PARTICIPATED IN BY THEM. THE USE OF SUCH TESTIMONY, THUS OBTAINED, AND THE CONVICTION BASED THEREON, MAKE THE ENTIRE TRIAL A MERE PRETENSE, AND IS IN VIOLATION OF DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

V.

THE DEFENDANT WAS HELD INCOMMUNICADO, WITHOUT HIS ATTORNEY HAVING BEEN SENT FOR, IN CUSTODY IN A PRIVATE HOME, ALTHOUGH PRIOR TO THE ALLEGED CONFESSION HE REQUESTED THAT HIS ATTORNEY BE SENT FOR. THIS REQUEST WAS DENIED TO HIM AND HE WAS THEREAFTER QUESTIONED INCESSANTLY, WITHOUT FOOD AND REST, WITHOUT THE KNOWLEDGE OF HIS ATTORNEY AND WITHOUT HIS ATTORNEY BEING ADVISED OF THE SAME. THE DEPRIVATION OF THE RIGHT OF COUNSEL AT THIS STAGE OF THE PROCEEDINGS AND THE USE OF STATEMENTS THUS OBTAINED CONSTITUTE A VIOLATION OF DUE PROCESS OF LAW AND

THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

VI.

THE DEFENDANT WAS DENIED THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT.

I.

Procedural due process of law was violated by the use in evidence of a purported confession obtained from the defendant Major Raymond Lisenba, through third-degree brutal methods. The appellant was subjected to physical violence and prolonged and incessant questioning without sleep and under tortuous mental ordeal similar to that employed in the Dark Ages and in the torture chamber, following which, statements were extorted and coerced from him and permitted in evidence in the trial. The use in evidence of such alleged confession obtained by such means and methods makes void the entire trial under the due process clause of the 14th Amendment to the Constitution of the United States, and denies to this appellant the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States.

Use by the State of California of an improperly obtained confession from this appellant to procure his conviction of a crime constituted a denial of due process of law as guaranteed by the 14th Amendment to the Constitution of the United States.

Chambers v. *Florida*, 309 U. S. 227, 84 L. Ed. 716;
White v. *Texas*, 310 U. S. 530, 84 L. Ed. 1342;
Canty v. *Alabama*, 309 U. S. 629, 84 L. Ed. 988;
Brown v. *Mississippi*, 297 U. S. 278, 80 L. Ed. 682.

An alleged confession obtained through enforced loss of sleep is as clearly in violation of due process of law as one obtained by force and violence.

Ziang Sung Wan v. *U. S.*, 266 U. S. 1, 69 L. Ed. 131.

The obtaining and use of the alleged confession of James was in violation of due process of law guaranteed by the 14th Amendment to the Constitution of the United States in the following respects:

1. James was taken into custody and removed from his house without any warrant or other legal process and without any reasonable or probable cause at that time (R. 961).

2. He was not taken to any jail or legal place of confinement but was taken to a private residence by investigators and police and kept in their private custody for from 48 to 60 hours. Such taking constitutes kidnaping under Section 207 of the Penal Code of California (R. 961-2, 1057).

3. While James was kept in private custody Officer J. C. Southard committed battery upon him (R. 1059).

4. He was not allowed to have any sleep, but officers, acting in relays, questioned him constantly (R. 1057) (R. 491).

5. He was taken to the county jail and placed in a private tank known as the "High Power Tank," without any charge being preferred against him, where he was kept under constant surveillance and never allowed to be alone, even in jail (R. 1059).

6. He was continuously questioned while he was in jail and was repeatedly removed from jail at all hours of the day and night for questioning (R. 1063).

7. He was not taken before the nearest and most accessible magistrate and arraigned on any charge, as required by the constitution and statutes of California (R. 1057).

8. He was at all times denied the right to the consultation with an attorney for days, until he was lodged in the county jail, at which time he was permitted to see an attorney on one occasion (R. 1057).

9. When he was removed from the jail on the weekend, to-wit, Saturday afternoon, he asked to have his attorney sent for and was informed by the investigating officers that they could not reach his attorney. They thereupon proceeded to question him all day and all night without giving him any food or rest (R. 1078).

10. The alleged confession was taken at 1:30 to 3:00 o'clock in the morning, in the presence of the officers who had beaten him up and who had kept him without food or sleep, and who had continuously and incessantly interrogated him (R. 1078).

11. Before James was taken to the jail he had no hernia (R. 461); after he was confined in the jail he had a hernia which followed his beating (R. 1061).

12. James' ears definitely carried evidence of the beatings which he had received (R. 484, *et seq.*). His left ear was made almost permanently deaf by the beatings (R. 494).

13. He was threatened on numerous occasions that he would be beaten up and tortured if he did not confess (R. 492).

14. The officers questioned him in relays, and almost incessantly, for a period of thirteen days, immediately preceding the taking of the alleged confession (R. 484, *et seq.*).

15. He was taken out of the jail to the district attorney's office for the purpose of interrogation, against his will, and without the knowledge of his counsel or of any of his friends (R. 489).

16. The officers, although they gave James no food, ate in front of him (R. 506).

17. The officers admittedly slept while they had other relays keeping James awake with constant questioning.

18. Shortly before the alleged confession was taken from James, the officers who had him in their private charge accused him of lying and threatened to take him back to the house and "beat your God-damned head off" unless he gave them the statement they wanted, which they repeated to him "a thousand times" (R. 492, 496, R. 1064).

19. Shortly before the statement was given, after the officers had kept him in their custody all day without taking him out to eat, they took him out and bought him a steak dinner and gave him a cigar on the promise that he would "tell them the *story*" (R. 1063).

20. The officers kept terrifying James with accusations of prosecution and punishment for other offenses than the one they were investigating (R. 1060, *et seq.*).

Comparing the case of Major Raymond Lisenba with that of *Chambers* v. *Florida*, 309 U. S. 229, 84 L. Ed. 716, we find the following facts:

1. Major Raymond Lisenba is a poor, weak, friendless and powerless defendant (R. 980).	1. Chambers was poor, ignorant, numerically weak, friendless and powerless (84 L. Ed. 722; see also footnote 11).
2. Major Raymond Lisenba was arrested on April 19, 1936; he was not taken, without delay, before a magistrate, nor was he immediately incarcerated in the county jail, as required by Sections 849 and 1597 of the Penal Code of California (R. 1056).	2. No charges were brought against Chambers for several days, while he was being questioned (84 L. Ed. 721).

3. After preliminary questioning Lisenba was taken by officers to a private home adjoining the house where he had been living, and was there admittedly held incommunicado for a period of about 48 hours during which time he was admittedly subjected to incessant questioning by officers who worked in relays (R. 1056).

3. Chambers, from the afternoon of Saturday, May 20th, until sunrise of the 21st, underwent persistent and repeated questioning and cross-questioning (84 L. Ed. 718).

4. The questioning of Lisenba took place in relays during all of which he was deprived of rest and sleep, while the officers, after each relay questioned him for four hours, took turns at sleeping (R. 1057).

4. Chambers was questioned for several days, and all night, before the confessions were secured.

5. Lisenba was alone with his accusers, who numbered from four to twelve men, including the district attorney, the chief deputy district attorney and a host of other inquisitors (R. 1058).

5. Chambers was carried singly from his cell and subjected to questioning in a fourth-floor jail room by four to ten men, including the county sheriff, his deputies, a convict guard and other white officers and citizens of the community.

6. Lisenba was admittedly hit by one of the officers having him in custody (R. 1058). He was ruptured, his ear was made red and swollen and he was made hard of hearing as a result of the beating he received (R. 1061). He testified he was

6. The testimony is in conflict as to the fact that all four prisoners were constantly threatened and physically mistreated until they finally, in hopeless desperation and fearing for their lives, agreed to confess on Sunday morning, just after

afraid for his life and finally agreed to tell what the officers wanted him to tell in order to avoid further beatings and mistreatment (R. 1063, R. 492, 493).

7. Lisenba was subjected to continuous questioning from the time of his arrest on April 19, until May 2, when the alleged confession was secured from him (R. 1063).

8. Lisenba was taken from the jail to the district attorney's office Saturday afternoon on May 2 (R. 1063). His request for his attorney was denied (R. 1058).

9. From the time Lisenba was taken to the district attorney's office, he was not given any food or rest, but was continuously questioned all day and night. He was left alone in the custody of the officers who slapped him (R. 497, 1059).

10. Sandwiches and coffee were served to the men who grilled Lisenba (R. 506).

11. Some time around midnight Lisenba finally said to his interrogators that if they would take him out and buy him a meal he would "tell the story." The confession of Lisenba broke at daylight.

7. Chambers was subjected to continuous questioning from May 14 to May 20 and 21, when the confession broke.

8. Chambers was taken from his cell on Saturday afternoon and continuously questioned, with a concentration of effort directed against him.

9. In the Chambers case, from 3:30 Saturday afternoon, with only short intervals for food and rest for the questioners, they stayed up all night.

10. Sandwiches and coffee were served to the men who grilled Chambers.

11. Sometime in the early hours of Sunday on May 21, probably about 2:30 or 3:00 o'clock A. M., the confession broke.

about 1:45 A. M. and was taken down by the district attorney between that time and about 3:00 or 3:30 A. M. (R. 1063).

12. Lisenba was not indicted until after the alleged confession. He was indicted on May 6th, the first formal accusation in the case and upon his arraignment he promptly pleaded not guilty (R. 1075, R. 816).

12. Chambers was not indicted until after the confession.

Comparing the case of Major Raymond Lisenba with that of *White* v. *Texas*, 310 U. S. 530, 84 L. Ed. 1342, we find the following:

1. Defendant Lisenba is illiterate, uneducated and poor — under sentence of death (R. 980).

1. Defendant White was an illiterate farm hand—under sentence of death.

2. Defendant Lisenba was taken into custody without warrant and held without legal accusation against him for seventeen days (R. 961, 963).

2. Defendant White was taken into custody without warrant and held without legal accusation for six or seven days.

3. Defendant Lisenba was not taken to a jail but to a private house and detained there for at least 48 hours without rest or sleep; he was then taken to the jail, from which he was removed at all hours of the day and night for constant and persistent questioning. Each time he was asked to confess (R. 1056) (R. 1057).

3. Defendant was taken to the county jail and was removed from the jail by Texas rangers on several successive nights. Each time he was asked to confess.

4. Officer Southard in charge of the investigation admitted striking the defendant. The officers admitted that during the early part of the investigation he was permitted no sleep and that he was held incommunicado. The defendant says he was beaten about the face and head and made hard of hearing. He also says that as a result of the mistreatment he suffered a hernia. Other witnesses corroborated the fact that his ear was swollen and red and that he had a hernia which he did not have five months before his arrest.

4. The petitioner said he was whipped. The officers denied this but admitted taking him to the woods.

5. During the period of his arrest, up to and including the giving of the alleged confession Lisenba was held incommunicado and was out of touch with friends or relatives, and no one except the officers on the investigation knew where he was. He asked to have his lawyer sent for. He was told one lawyer was unavailable and the other one would not know anything about the case (R. 1059-1061).

5. During the period of his arrest, up to and including the signing of the alleged confession the petitioner White had no lawyer, no charges were filed against him, and he was out of touch with friends or relatives.

6. The defendant was removed from jail day and night, after he was lodged there. The questioning was

6. The local peace officer was not sure how many times the prisoner was removed from jail.

constant and persistent. While in jail he was confined in the "High Power Tank" (R. 1078).

7. Defendant says that before the confession he was left alone in a room with the officer who had first struck him, and was told that unless he confessed the officer would "beat his God-damned head off" (R. 497).

7. Rangers kept taking the petitioner to the woods, and threatened him. Before carrying petitioner to Beaumont, where the alleged confession was taken, the sheriff talked about an hour and a half with him.

8. In jail the defendant Lisenba was under constant surveillance of the sheriff and was kept in a special place called the "High Power Tank," and was continually questioned by officers in relays; he was also frequently removed from the jail at all hours of the day and night for questioning (R. 1062) (R. 1060).

8. In jail, the sheriff put petitioner by himself and "kept watching him and talking to him."

9. The defendant's alleged confession was taken down between 1:45 and 3:00 or 3:30 o'clock A. M. (R. 1078).

9. The alleged confession was reduced to writing after 2:00 A. M.

10. Immediately before it was taken down Lisenba was repeatedly asked by the district attorney to confess, and the district attorney conducted the interrogation in the presence of numerous deputies in the district attorney's office and the sheriff's office (R. 499) (R. 501).

10. Immediately before it was taken down the petitioner was asked by the private prosecutor whether he was ready to confess.

Comparing the case of Major Raymond Lisenba with that of *Brown* v. *Mississippi*, 297 U. S. 278, 287, 80 L. Ed. 682, we see as follows:

1. In the case of Major Raymond Lisenba, aside from the alleged confessions there was no evidence sufficient to warrant the submission of the case to the jury (R. 984).	1. In the case of *Brown* v. *Mississippi*, aside from the alleged confessions there was no evidence sufficient to warrant the submission of the case to the jury.
2. After preliminary inquiry showing brutal third degree methods, physical violence and deprivation of sleep, and a course of continuous questioning for thirteen days, the confessions were received over the objection of defense counsel (R. 629).	2. After a preliminary inquiry testimony as to the confessions was received over the objections of defense counsel.
3. Lisenba testified that the confessions were false and had been procured by physical and mental torture (R. 484 *et seq.*).	3. Defendants testified that the confessions were false and had been procured by physical torture.
4. The case went to the jury with instructions that if the jury had reasonable doubt as to the confessions having resulted from coercion, and being untrue, they were not to be considered as evidence, but the court refused an instruction setting up all the things that were done to Lisenba, embodied in a single instruction (R. 1122).	4. The case went to the jury with instructions, upon request of defense counsel, that if the jury had reasonable doubt as to the confessions having resulted from coercion, and being untrue, that they were not to be considered in evidence.

5. On appeal to the Supreme Court the defendant assigned as error the inadmissibility of the confessions (R. 950 *et seq.*).

5. On their appeal to the Supreme Court the defendants assigned as error the inadmissibility of the confessions. The judgment was affirmed.

6. Defendant Lisenba sought a new trial in the Supreme Court of California, one of the grounds being that the alleged confessions were obtained by coercion and brutality, known to the court and to the district attorney (R. 950 *et seq.*).

6. Defendants then moved in the Supreme Court of the State, to arrest the judgment and for a new trial, on the ground that all the evidence against them was obtained by coercion and brutality, known to the court and to the district attorney.

7. Lisenba complained that he had been denied the benefit of counsel or an opportunity to confer in a reasonable manner. It was not denied by the officers having custody of him that he was held incommunicado for a considerable period, or that they had not secured his counsel when he asked for such counsel (R. 484 *et seq.*). Lisenba's testimony was supported by the testimony of the people's own witnesses (R. 950 *et seq.*).

7. Defendants complained that they had been denied the benefit of counsel or opportunity to confer with counsel in a reasonable manner. The motion was supported by affidavits.

8. Upon being taken into custody Lisenba was taken to a private home where he was accused by a number of men of the crime (R. 1056).

8. Brown, on the night of his arrest, was taken to the home of one of the other defendants where a number of white men were gathered who began to accuse him of the crime.

9. Upon Lisenba's denial, one of the officers admittedly committed a battery upon him (R. 1058).

9. Upon his denial they seized the defendant and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down, they hanged him again and let him down a second time, and still he protested his innocence.

10. Lisenba was constantly and continuously questioned and kept weak from lack of sleep (R. 1059).

10. Brown, tied to a tree and whipped, still declined to accede to the other demands that he confess, and was finally released and returned to his home with some difficulty.

11. Lisenba, after days and nights of continuous questioning, cross-questioning and threats, denied his guilt (R. 1059).

11. Brown was again arrested and taken to jail in a contiguous county. On his way he was stopped and severely whipped.

12. Lisenba was placed in a room with the deputy who had struck him and told by the deputy that unless he confessed the deputy would "beat his God-damned head off" (R. 497). He was made hard of hearing and ruptured as a result of this mistreatment (R. 494).

13. Lisenba was told to tell "the story" the way the officers wanted it. They had repeated it to him "a thousand times."

13. Brown was made to understand that the whipping would be continued unless and until he confessed in every detail as demanded by those present.

14. The officer in charge of the investigation admitted he had struck Lisenba (R. 1060).

14. The sheriff of the county of the crime admitted that he had heard of the whipping, but averred he had no personal knowledge of it.

15. The officers investigating the case admitted that "one of Lisenba's ears may have been red" (R. 1061).

15. The sheriff admitted that one of the defendants, when brought before him, was limping and did not sit down.

16. The district attorney, nevertheless, went through the solemn farce of hearing the "free and voluntary confession" of Lisenba at 1:45 in the morning, and he and others then present were witnesses used in court to establish the so-called confession and its "voluntary" character which was received in court and admitted into evidence over the objections of the defendant (R. 629, 630, 1063).

16. Nevertheless, the solemn farce of hearing the "free and voluntary confessions" was gone through with, and these two sheriffs and one other person then present were the three witnesses used in court to establish the so-called confessions which were received by the court and admitted in evidence over the objections of the defendants.

17. There was thus ample before the court when these confessions were first offered to make known to the court that they were not beyond all reasonable doubt free and voluntary (R. 484 *et seq.*).

17. There was thus enough before the court when these confessions were first offered to make known to the court that they were not beyond all reasonable doubt free and voluntary.

18. The State does not deny that Lisenba was struck They do not deny that he was held incommunicado.

18. The State does not deny mistreatment of Brown.

nor that he was persistently questioned, day and night, and at all hours, prior to the securing of the alleged confession, for 13 days (R. 950 *et seq.*).

19. The facts are not only undisputed, they are admitted, and admitted to have been done by officers of the State, and all this was definitely well-known to everybody connected with the trial, including the State's prosecuting attorney and the trial judge presiding (R. 484 *et seq.*, R. 629, 630).

19. The facts are not only undisputed, they are admitted, and admitted to have been done by officers of the State in conjunction with other participants, and all this was definitely well-known to everybody connected with the trial, and during the trial, including the State's prosecuting attorney and the trial judge presiding.

The court said in the *Brown* v. *Mississippi* trial, 80 L. Ed. p. 687:

> "Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to a conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. Moore *v.* Dempsey, 261 U. S. 86, 91, 67 L. Ed. 543, 545, 43 S. Ct. 265. The State may not deny to the accused the aid of counsel. Powell *v.* Alabama, 287 U. W. 45, 77 L. Ed. 158, 53 S. Ct. 55, 84 A. L. R. 527. Nor may a State through the action of its officers, contrive a conviction through the pretense of a trial which in truth is 'but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.' Mooney *v.* Holohan, 294 U. S. 104, 112, 79 L. Ed. 791,

794, 55 S. Ct. 340, 98 A. L. R. 406. And the trial equally is a mere pretense where the State authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires 'that State action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' Herbert v. Louisiana, 272 U. S. 312, 316, 71 L. Ed. 270, 272, 47 S. Ct. 103, 48 A. L. R. 1102. It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for a conviction and sentence was a clear denial of due process.

"2. It is in this view that the further contention of the State must be considered. That contention rests upon the failure of counsel for the accused, who had objected to the admissibility of the confessions, to move for their exclusion after they had been introduced and the fact of coercion had been proved. It is a contention which proceeds upon a misconception of the nature of petitioners' complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265, supra. We are not concerned with a mere question of State practice, or whether counsel assigned to petitioners were competent or mistakenly assumed that their first objections were sufficient. In an earlier case the Supreme Court of the State had recognized the duty of the court to supply corrective process where due process of law had been denied. In Fisher v. State, 145 Miss. 116, 134, 110 So. 361, the court said: 'Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief iniquity, the crowning infamy, of the Star Chamber,

and the Inquisition and other similar institutions. The constitution recognized the evils that lay behind these practices and prohibited them in this country. * * * The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective.'"

In *Chambers* v. *Florida*, 309 U. S. 227, 84 L. Ed. 716, 722, 723, it is said:

"The determination to preserve an accused's rights to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless.

"This requirement—of conforming to fundamental standards of procedure in criminal trials—was made operative against the States by the Fourteenth Amendment. Where one of several accused had limped into the trial court as a result of admitted physical mistreatment, inflicted to obtain confessions upon which a jury had returned a verdict of guilty of murder, this Court recently declared, Brown *v.* Mississippi (297

U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461), that 'It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.' "

In *White* v. *State of Texas*, 310 U. S. 530, 84 L. Ed. 1342, 60 S. Ct. 706, the Court said, quoting from *Chambers* v. *Florida*, 309 U. S. 227, 84 L. Ed. 716:

"'Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death.'"

II.

During the trial the prosecution brought two live, hissing, writhing rattlesnakes into the courtroom and placed them before the jury. The rattlesnakes had no evidentiary value. Use of demonstrative evidence in a criminal trial which only serves to inflame the passions and prejudices of the jury violates due process of law and the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States.

The bringing of live, hissing, writhing rattlesnakes into the courtroom was an appeal to the passions and prejudices of the jury. Demonstrative evidence that merely inflames the passions of jurors was in violation of due process of law guaranteed by the 14th Amendment to the Constitution of the United States. A fair trial is the essence of due process of law. The trial must not be hurried to a conviction by passion and prejudice and must not be ruled by things that blind the reason and sway the jury from a fair consideration of the case.

Chambers v. *Florida*, 309 U. S. 227, 242, 84 L. Ed. 716;
Snyder v. *Mass.*, 291 U. S. 97, 78 L. Ed. 674;
Moore v. *Dempsey*, 261 U. S. 86, 67 L. Ed. 543;

Twining v. *New Jersey*, 211 U. S. 78, 53 L. Ed. 97;
Hurtado v. *U. S.*, 110 U. S. 516, 28 L. Ed. 232.

The deceased died of drowning. (R. 93.) The bringing of the rattlesnakes into the courtroom had no evidentiary value to prove the death of the deceased through drowning, nor did it have any evidentiary value in proving or disproving to the jury any alleged attempt on the part of the defendant or anyone else to kill the deceased by means of a rattlesnake. It was testified to that only one rattlesnake was used, and yet three snakes were brought before the jury and allowed to be exhibited in a manner that caused horror and panic in the courtroom. As stated on the motion for new trial:

> "On said day the District Attorney, acting through his said deputies, for the purpose of inflaming the minds of the jurors, caused to be brought into the courtroom the said two rattlesnakes. The said snakes were in a box which was carried down the aisle of the courtroom, every seat of which was occupied. The snakes were alive and sounding their rattles. A wave of terror—I can find no other language more accurate—swept through the courtroom. Spectators rose from their seats. Some nearest the aisle shrank away. Many uttered exclamations of fright.
>
> "The scene as described by a reporter of the Herald-Express (a large daily newspaper) was as follows:
>
> " 'Buzzing their hollow rattles so loudly that women in the crowded courtroom shivered and shuddered at the eerie, frightening sounds, two diamond-back rattlesnakes glittering in their new skins today were placed on the counsel table in Superior Charles W. Fricke's court, where Robert S. James, Birmingham barber, crouched ghost-faced and jittery at his trial for the murder of his golden-haired bride, Mary.
>
> " 'Paraded across the courtroom in a velvet covered, venom-splashed 5-foot glass cage, two deadly diamond-back rattlesnakes late today hissed and shook their hol-

low rattles eerily, and struck out with their evil wedge-shaped heads, as they were exhibited less than 2 feet away, before the fascinated eyes of 10 men and 2 women who made up the jury trying Robert S. James for the murder of his golden-haired wife, Mary.

"'The reptiles had just been identified by Snake Joe Houtenbrink as Lethal and Lightning, two guaranteed 'hot' snakes he had sold to Charles H. Hope, hard talking ex-sailor, the day before Mrs. James was slain by drowning in her bathtub in her La Canada home.'

"The Examiner reporter gave the following description of the scene:

"'Man's enemy from primordial ages, the snake, yesterday was made the living, visible symbol of the Robert James murder case. The diamond-backed rattlesnakes hissed and struck before the trial jury as a long glass box was borne forward like a hideous offering of a black ritual.'

"I was standing with my face toward the jury at the time. I noticed some of them gave a kind of gasp almost at the moment I noticed the consternation of the audience. Some of the spectators, however, rose to their feet. Many of them shrank away. I made a protest at the time because of the obvious effect which the bringing of the snakes into the courtroom had upon the spectators.

"I am informed and believe, and therefore state the fact to be, that the bringing of the rattlesnakes into the courtroom in the manner described had such effect upon the minds of the jurors as prevented them from giving fair consideration to the evidence thereafter introduced by the defendant. The source of my said information is a newspaper article containing alleged interviews with members of the jury, none of whom have publicly, or so far as I know at all, denied the statements attributed to them.

"The said interviews were published in a daily newspaper of large circulation, to-wit: the Los Angeles Examiner, of July 25, 1936, and I quote from them as follows:

"Harold W. Hart, one of the jurors, said:

"'James had been convicted in my own mind ever since they brought the rattlesnakes into the courtroom, showed them to us, and then introduced witnesses who told us that James had actually stuck his wife's foot into a box containing one of these serpents and had watched it strike her.'

"Mrs. Ollie Sype said:

"'The sight of the rattlesnakes which were exhibited as weapons with which Robert James did his wife to death stunned me. It was the most shocking experience of my life.'"

The exhibition of these snakes did not prove, or even tend to prove any issue in this case, since neither the appearance nor the conduct of these snakes as they were shown to the jury tended to establish any facts under controversy. Their only purpose, therefore, was to excite the passion and prejudice of the jurors. Where the exhibition of objects is solely for the purpose of arousing prejudicial emotions and through cunning presentation stir up passion or unduly incite hatred and animosity, and so lead the jury to act upon passion and prejudice instead of proof, due process of law is violated, because the accused is deprived of a fair trial. (*Chambers* v. *Florida*, 309 U. S. 229, 84 L. Ed. 716; *Snyder* v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674.)

In *McKay* v. *State*, 39 L. R. A. (N. S.) 714, it is stated that "an accused in a criminal prosecution is entitled to a trial upon competent, relevant evidence; evidence which at least tends to establish his guilt or innocence, and evidence which has no such tendency but which, if effective at all, could only serve to inflame the minds and passions of the jury, should not be admitted."

The Court there said, with reference to the admission into evidence of two shirts stained with blood, and various articles of clothing, that their admission in evidence was error, since the testimony of the coroner, a practicing physician and surgeon, showed that the deceased had received three blows on the side of his head, each of which fractured his skull, and two of which penetrated the brain, either of which the doctor said was sufficient to have proved fatal. The Court there pointed out that the evidence was clear that the deceased had been murdered and the only question before the jury was, did the defendant commit the murder? The admission of bloodstained garments, flaunting them before the jury, could in no manner identify, or even tend to identify, the prisoner, as to the murder. The Court there said:

> "We can conceive of no other purpose which these exhibits could subserve than to excite the passions and inflame the minds of the jury. A defendant who is being tried for any offense, and particularly one involving the possible taking of his life, is entitled to a trial upon competent evidence,—evidence which tends to show his guilt or innocence, and not upon evidence which has no tendency in that direction but which can only serve the purpose of distracting the minds of the jury from the real issue to gruesome exhibits, which may easily lead them to a wrong conclusion."

On rehearing, the Court again affirmed its former ruling, stating:

> "No attempt to disguise the motive of counsel in offering these blood-stained garments in evidence can obscure the fact that the real motive was for the purpose of exciting the passions of the jury."

In *Flege* v. *State*, 93 Neb. 619, 142 N. W. 276, 47 L. R. A. (N. S.) 1107, the Court, in reversing the case for improperly admitting into evidence clothing worn by the deceased at

the time of her death, which did not prove defendant's guilt but were only introduced for the purpose of inflaming the jury, stated (p. 1112):

> "There is nothing in the record showing that the exhibition of the bloody and burnt garments was a proper or necessary part of the state's case. The court adheres to the holding in McKay *v.* State, 90 Neb. 63, 39 L. R. A. (N. S.) 714, 132 N. W. 741, Ann. Cas. 1913B, 1034, Id. 91 Neb. 281, 39 L. R. A. (N. S.) 720, 135 N. W. 1024, Ann. Cas. 1913B, 1039, that it appears that the introduction of the bloodstained garments was for the purpose of arousing the passions of the jury, and by that means securing a conviction, the practice should be condemned and a judgment of conviction reversed. Unless it appears that the offered evidence would be material to some inquiry in the case on trial, such exhibits should be excluded. See Cole *v.* State, 45 Tex. Crim. Rep. 225, 75 S. W. 527; Christian *v.* State, 46 Tex. Crim. Rep. 451, 83 S. W. 822; Williams *v.* State, 61 Tex. Crim. Rep. 356, 362, 136 S. W. 771; Lucas *v.* State, 50 Tex. Crim. Rep. 219, 95 S. W. 1055. In 2 Wharton, on Criminal Evidence 10th ed. sec. 941, it is said: 'As clothing is in the nature of demonstrative evidence it has a strong tendency to arouse feelings of prejudice or passion, and unless the articles so introduced serve the purpose of identifying *the purpose of identifying* the deceased, or of honestly explaining the transaction, the introduction is irrelevant, and constitutes prejudicial error; and particularly is this true when it is displayed in such manner as to arouse prejudice and passion."

As pointed out by the dissenting opinion of the late Mr. Justice Seawell of the California Supreme Court,—"what aid the two live rattlesnakes which were brought into the courtroom, rattling and writhing, and thus exhibited to the jury in determining the cause of death on any theory, does not appear from a painstaking examination of the entire transcript of the proceedings, and we feel satisfied

that the spectacular exhibition of the rattlesnakes, in the circumstances to be hereafter noted, unquestionably constituted prejudicial error."

The production of the snakes in the courtroom constituted a violation of due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

In *Frank* v. *Mangum*, 237 U. S. 309, at 334, this Court, in commenting on a trial alleged to have been dominated by a mob, said:

> "We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law."

Again, in *Downer* v. *Dunaway*, 53 F. (2d) 586, the Court there granted a writ of *habeas corpus* where the trial was dominated by a mob.

A trial dominated by fear of rattlesnakes is no different in principle than a trial dominated by mob violence. Mob violence occurs by a shouting, hooting, ferocious and inflamed group outside, creating a state of fear and apprehension in the minds of the jurors and distracting their attention from the true issues in the case and from finding a verdict according to the facts, the law and the evidence. The bringing of live rattlesnakes into the courtroom, creating a state of fear inside the courtroom, likewise produced a verdict based on passion and prejudice, stunned the jurors and distracted them from the facts, the law and the evidence.

In *Moore* v. *Dempsey*, 261 U. S. 86, 67 L. Ed. 543, the Court said:

> "But if the case is that the whole proceeding is a mask, that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights."

So, in this case, the whole proceeding was but a mask of a trial. A woman was found drowned, but the proceedings centered mostly on rattlesnakes, the hissing, writhing bodies of which were exhibited to the jury with no other thought or purpose than to sweep the jury to the irresistible end, a conviction of murder in the first degree. The whole trial was therefore a mock and a sham.

In *Ippolito* v. *U. S.*, 108 F. (2d) 668, 671, the court in commenting on prejudicial remarks made to a jury, and ordering a judgment reversed, said:

> "Public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by appeals of counsel to passion and prejudice."

In that case, peculiarly enough, counsel made an argument to a jury in which it was stated: "I hope this jury will keep its eyes open the same as it would if it were walking in a jungle full of *rattlesnakes* and skunks."

If comment to the jury about rattlesnakes is prejudicial, as appealing to the passions and prejudices of the jurors, how much more is the actual bringing of the snakes into the courtroom?

In *People* v. *Madison*, 3 Cal. (2d) 668, 679, the court said:

> "* * * we cannot give sanction to the practice of exhibiting unnecessarily to the jury gory physical evidences of the crime which are calculated or likely to inflame the jury's deliberations."

Due process comprehends a fair and just hearing and a full and adequate opportunity for defense.

Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55, 84 A. L. R. 527;

Hurtado v. *California*, 110 U. S. 516, 28 L. Ed. 232, 4 S. Ct. 111, 292;

Maxwell v. *Dow*, 176 U. S. 581, 44 L. Ed. 597, 20 S. Ct. 448, 494;

Holden v. *Hardy*, 169 U. S. 366, 42 L. Ed. 780, 18 S. Ct. 383;

Twining v. *New Jersey*, 211 U. S. 78, 111, 53 L. Ed. 97, 111, 29 S. Ct. 14;

Interstate Commerce Comm. v. *Louisville & N. R. Co.*, 227 U. S. 88, 93, 57 L. Ed. 431, 434, 33 S. Ct. 185;

United States v. *Abilene & S. R. Co.*, 265 U. S. 274, 288, 68 L. Ed. 1016, 1022, 44 S. Ct. 565.

There was also a denial of equal protection of the law as well as the due process clause of the 14th Amendment.

Truax v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124, 27 A. L. R. 375.

> "Due process implies, at least, conformity to natural and inherent principles of justice. * * *
>
> "There are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, and these principles recognize the inherent rights of the individual, and are embodied and intended to be protected and secured by the fundamental law, and the 14th Amend-

ment imposes upon the courts the duty to protect every individual or corporation from arbitrary denial or abridgment of those rights by the state."

Holden v. *Hardy*, 169 U. S. 366, 42 L. Ed. 780, 790.

It is said in 1878, Mr. Pitt Taylor, Evidence, 7th ed. I, par. 557:

"Though evidence addressed to the senses, if judiciously employed, is obviously entitled to the greatest weight, care must be taken not to push it beyond its legitimate extent. The minds of jurymen, especially in the remote provinces, are grievously open to prejudices, and the production of a bloody knife, a bludgeon, or a burnt piece of rag, may sometimes, by exciting the passions or enlisting the sympathies of the jury, lead them to overlook the necessity of proving in what manner these articles are connected with the criminal of the crime; and they consequently run no slight risk of arriving at conclusions which, for want of some link in the evidence, are by no means warranted by the facts proved. The abuse of this kind of evidence has been a fruitful theme for the satirists, and many amusing illustrations of its effect might be cited from our best authors. Shakespeare makes Jack Cade's nobility rest on this foundation: for Jack Cade having asserted that the eldest son of Edmund Mortimer, Earl of March, 'was by a beggar woman stolen away', 'became a bricklayer when he came to age', and was his father, one of the rioters confirms the story by saying, 'Sir, he made a chimney in my father's house, and the *bricks* are alive to this day to testify to it; therefore deny it not.' Archbishop Whateley—who makes use of the above anecdote in his 'Historic Doubts relative to Napoleon Buonaparte,'—adds, 'Truly, this evidence is such as country people give one for a story of apparitions; if you discover any signs of incredulity, they triumphantly show the very house which the ghost haunted, the identical dark corner where it used to vanish, and perhaps even the tombstone of the person whose death it foretold.' "

"The great dramatist's example in 'Julius Caesar' will occur to everyone: 'See, what a rent the envious Casca made! * * * Here is himself, marred, as you see, with traitors.' For the extent to which the Roman advocates developed this method of tempting emotions to overwhelm reason, see Forsyth's Hortensius the Advocate, 3d ed. 92, 96." (*Wigmore on Evidence*, 3rd ed., Vol. IV, p. 253.)

1877, Scintillae Juris, 58, by Mr. Justice C. J. Darling, states:

"What is called 'real evidence'—mostly bullets, bad florins, and old boots—is of much value for securing attention. This is true even when these exhibits prove nothing,—as is generally the case. They look so solid and important that they give stability to the rest of the story. The mind in doubt ever turns to tangible objects. They who first carved for themselves a Jupiter from a log of wood knew very well that the idol could do nothing for them; but it enabled them easily to realize a power who could. A rusty knife is now to an English juryman just what a 'scarabaeus' was to an Egyptian of old. I have seen a crooked nail and a broken charity-box treated with all the reverence due to relics of the holiest martyrs."

This "libellus," by Mr. C. J. (later Justice) Darling, published at first anonymously, went into its eighth edition and perhaps later editions, and is as applicable to the case of Major Raymond Lisenba today as it was when written.

III.

Numerous witnesses were brought from another State without notice to the defendant, and he was in effect placed upon trial in California upon a purported offense alleged to have occurred in Colorado, without any indictment, information or judgment thereon and without any jurisdiction of the California court of the subject-matter therein, and with-

out any opportunity to the defendant to have the processes of the Court to produce witnesses in his behalf or to prepare a defense against such accusation, such offenses being in no way connected with the one for which he was on trial. Such evidence constituted a large portion of the present case against appellant and was a violation of due process of law and the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States.

The use of evidence obtained in Colorado by the State of California in California is in violation of due process in the following respects:

1. The very essence of due process of law is notice and an opportunity to be heard.

Powell v. *Alabama*, 287 U. S. 45, 68;
Galpin v. *Page*, 18 Wall. 350, 368, 369;
Frank v. *Mangum*, 237 U. S. 309, 340.

The necessity of due notice and an opportunity to be heard are among the immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard. Judgment without notice and opportunity to be heard wants all the attributes of a judicial determination. It is judicial usurpation and oppression and never can be upheld where justice is justly administered.

Even before the 14th Amendment was adopted, the Supreme Court had insisted that common justice required that no man should be condemned in person or property without notice and an opportunity to make his defense.

Baldwin v. *Hale*, 1 Wall. 223, 233.

In *Twining* v. *New Jersey*, 211 U. S. 78, 110, the Court observed that these two fundamental conditions seemed to be universally prescribed in all systems of law established by civilized countries.

To place a man upon trial in California upon an indictment charging him with an alleged murder in California, and then to bring witnesses to the State of California from Colorado regarding an alleged occurrence several years before in the State of Colorado, is necessarily without notice to him of that charge and without an opportunity to defend against it.

When for the first time such evidence is proposed to be presented by the prosecution when the accused and his counsel are seated in the trial of the case, how can he prepare to meet such a charge growing out of alleged occurrences in another state? What processes of the court does he have to bring witnesses from that other state to the state in which he is placed upon trial? None whatsoever. The result necessarily follows that he is deprived of an opportunity to meet such a charge and to defend against it.

It is no answer to say that he is not on trial on that charge but only on trial on the charge in the California court. Such a statement necessarily proves the very lack of notice and of opportunity to prepare and to defend against such other evidence. The very fact that the prosecutor produced it in court in this case shows that it is persuasive and calculated to sway the jury in this case to convict the defendant. Therefore all opportunity must be afforded to the defendant to meet such evidence if it is proper to be presented at all. This is not the case where a person has been tried in another state where the court has jurisdiction of both the person and the subject-matter and where the processes of that court are available to the accused and where he thereafter finds himself convicted and is faced with the impeaching questions growing out of such a conviction.

2. Article VI of the United States Constitution provides for the trial of a person in the vicinage where the offense

was committed. This is the old common law rule, and of course its object is to give to the person accused the right to be tried and to produce the witnesses where those witnesses are available. To place a defendant on trial more than a thousand miles away and to produce witnesses from another state which the state has the power to produce by reason of its unlimited finances is a violation procedurally of due process of law.

It violates also two fundamental principles of the production of legal evidence—one being unfair surprise, and the other, unfair prejudice. (See Wigmore on Evidence, 3rd Ed., Section 1157.)

The evidence in this case on the Colorado situation was offered to show a general plan or scheme. The alleged offense in Colorado occurred four years prior. It was in no way connected with the present alleged offense for which the defendant was placed on trial. Hence the occurrence in Colorado could have no evidentiary value to show a general scheme or plan to do the thing charged in this case. It could only be produced for the purpose of prejudicing the accused in the minds of the jury. It was not at all inter-related and so could not be a part of an alleged general scheme or plan.

In California a person charged with crime has no means of getting any additional information in advance of his trial other than that furnished to him by the prosecutor. There are no provisions in law for a bill of particulars. All that the defendant was entitled to have was a copy of the indictment and the transcript of such witnesses as the district attorney chose to present to the Grand Jury, at which time no counsel for the defendant could be present; nor could he request or secure any other additional information prior to trial. No counsel for the defendant could be present in the Grand Jury room. The district attorney is re-

quired to present only such evidence as he may wish to present to the Grand Jury.

In 1936, in California, a witness was not required to attend court unless he lived a distance of less than 100 miles from the place of trial. (Section 1989, Code of Civil Procedure of California.)

In *Commonwealth* v. *Kentucky*, 112 F. (2d) 352 (June 5, 1940) at page 355, the court said:

> "The tribunals of one state have no jurisdiction over persons of other states unless found within their territorial limits and the attempt to extend their process into other states would be treated in every other forum as an act of usurpation without binding efficacy. Process from courts of one state cannot summon parties living in another state to leave its territory and respond to proceedings against them and where the only object of an action is the determination of personal rights and obligations of a defendant, constructive service on a non-resident is ineffectual. A person residing outside the state is not required to come within its borders and submit his controversy to its courts because of notice of the suit at the place of his residence, and an ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in, as outside, the state. Galpin *v.* Page, 85 U. S. 350, 367, 18 Wall. 350, 367, 21 L. Ed. 959; Pennoyer *v.* Neff, 95 U. S. 714, 727, 24 L. Ed. 565; Baker *v.* Baker, Eccles & Co., 242 U. S. 394, 403, 37 S. Ct. 152, 61 L. Ed. 386; MacDonald *v.* Maber, 243 U. S. 90, 97, 37 S. Ct. 343, 61 L. Ed. 608, L. R. A. 1917F, 458; Flexner *v.* Farson, 248 U. S. 289, 293, 39 S. Ct. 97, 63 L. Ed. 250."

It follows therefore that both the accused and his attorney are powerless under such circumstances to prepare a defense to a host of witnesses brought from another state and to get witnesses who may controvert, contradict or

satisfactorily explain the statements made by those witnesses.

And if a man is entitled to the right of counsel to defend himself at all stages of the proceedings, as set forth in *Powell* v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, how can such counsel adequately defend a poor client when he has no opportunity, even if funds were available, to go to another State during the middle of a trial, to secure the necessary evidence; and how can he properly defend a man where he is entirely unfamiliar with the locale of the alleged other offense, has no opportunity to examine the highways to determine if they are straight or crooked, and whether they are in the condition which many witnesses may testify to.

In *Snyder* v. *Mass.*, 291 U. S. 97, 78 L. Ed. 674, it was held that the absence of the defendant from the scene of an alleged offense on a view of the premises by the jury, did not deny due process of law, one reason being that the attorney was present at the scene and two of the jurors.

But here, the attorney would have no opportunity to view the scene described by witnesses from another jurisdiction, and would have no opportunity to interview witnesses who lived in the neighborhood and who might have important information which would explain, clarify or deny the testimony of other witnesses. Such procedure, we respectfully submit, violates due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

In the dissenting opinion of the late Mr. Justice Seawell of the California Supreme Court, he points out as follows:

> "The admissibility and sufficiency of the evidence admitted to prove that the death of Winona, which occurred in the State of Colorado in 1932, was accomplished by the felonious and premeditated act of the defendant, waiving the reasonable doubt doctrine, depends upon the further question as to whether it satis-

fied the rule which provides that such evidence cannot be admitted if in character it is so vague, uncertain or unsubstantial as merely to create a suspicion of guilt. Defendant further objected to an offer of proof of the other alleged crime claimed to have been committed in another jurisdiction distant more than a thousand miles from the place of trial and invoked the common law and statutory rights which vouchsafe the rights of an accused to be tried in the county in which the crime was committed. The ancient right cannot be denied in a case where punishment is to be imposed for the specific offense charged in the indictment or information. The right does not exist where the evidence of another crime is limited in its probative scope and effect to the purposes heretofore defined. The appellant complains that great distance from the situs of the offense deprives the accused in many cases of the means of discovering evidence material to his defense and, in effect, amounts to a denial of the process of the court to compel the attendance of witnesses in his behalf (Cal. Const. art. I, sec. 13). The point urged is illustrated by a matter which arose at the trial of the instant case. J. D. Rogers, the superintendent of Pike's Peak Auto Highway, a private enterprise, was brought from Colorado as witness on behalf of the state. He testified that, upon his arrival at the scene where Winona James was injured and in attempting to ascertain whether she was breathing, he placed his head near her mouth and detected a strong odor of liquor on her breath. This evidence furnished support to the prosecution's argument to the jury that James had made her drunk before the automobile crash. This evidence would not have ordinarily been anticipated by the defendant in advance of trial, a contingency which frequently arises in the trial of cases. The appellant brought to the court's attention the fact that a letter had been recently delivered to him at the county jail, written by a party or parties in Colorado, outside the jurisdiction, who met and talked with Mr. and Mrs. James at the top of Pike's Peak a short time before

they started down the mountain stating they could and would testify that there was no evidence or indication that either Mrs. James or James was affected by liquor. It appears from the discussion between court and counsel that the named party volunteering the information by letter and counsel for defense were acting in good faith in the matter, and counsel, in asking the process of the court to produce the evidence by deposition or otherwise, was not derelict in disclosing the information. A continuance was moved that the deposition of said person might be taken to show that Mrs. James was sober and in a normal condition a short time before she received said injuries. No formal motion having been made by way of affidavit, the court denied the motion for a continuance for the purpose stated. The motion was renewed when the assistant district attorney in his argument severely arraigned the defendant for preparing his wife for death through the means of intoxicating liquor. It is so obvious as not to require more than a mention of the proposition that, in circumstances where the means of communication or opportunity for investigation and preparation for a defense and all the other recognized advantages which local contacts afford, are made difficult or inaccessible to the person placed on trial for a crime committed far distant from the place of the trial, every opportunity should be liberally extended to enable such person to meet any surprise evidence or unfor-seeable situation arising at the trial, even at the cost of a continuance. The importance of the testimony of the two Colorado persons who offered to testify in rebuttal of the Rogers' evidence as to the sobriety of Mrs. James is given added emphasis by the prominence this court has given the issue in its opinion herein as well as that given to said issue by the prosecution in argument to the jury."

The violation of due process of law guaranteed by the 14th Amendment to the Constitution of the United States in the use of the Colorado evidence is emphasized by two facts, namely: First, the defendant was not apprised of

the fact that such evidence would be placed before the jury until it was actually offered in evidence; and, second, the transaction concerning which the Colorado witnesses testified was entirely collateral and did not tend to prove any issue involving the charge upon which the defendant was on trial.

To show how prejudicial it was for the defendant to have the Colorado evidence introduced it appears from the record that defense counsel stated to the Court that they received information warranting the belief that by taking depositions in Colorado Springs, Colorado, the defense could contradict some of the facts deemed relative to the Colorado evidence.

J. D. Rogers, a prosecution witness, had testified to the apparently intoxicated condition of Mrs. James. The defense moved for a reasonable continuance to give them an opportunity to take the deposition of a witness who had communicated with the defense to the effect that Mrs. James was not intoxicated in Colorado at the time the accident occurred to James' car in Colorado, in 1932 (R. 684).

James testified on *voir dire* examination that he had received an envelope dated January 24, 1936, in the county jail in Los Angeles, containing a letter from a man whom he had seen at the top of Pike's Peak (R. 685).

James testified that during the time his wife was in the hospital she was conscious and remained conscious until the time of her death, and that she had visitors in the hospital These were important witnesses for the defense in any event, if the defense was required to meet testimony from Colorado, a State more than one thousand miles away from California. One of the witnesses would have been the man at the top of Pike's Peak, whom James and his wife had visited with before the accident occurred. The other witnesses who might have been available were people who visited Mrs. James in Colorado after she recovered con-

sciousness and while she was in the hospital. The testimony of these latter witnesses would have shown that she made no complaint at that time against her husband, but that on the contrary, that his conduct toward her was affectionate and attentive and gave no evidence of even a suspicion that a crime had been attempted. The prosecutor put up a vigorous objection (R. 688). To this objection defense counsel said:

> "Mr. Clark: If your Honor please, this defendant h not been shown in this case to be a—there is no reason for counsel for the prosecution taking that stand. He has brought into this court evidence of another offense which it is claimed took place more than four years ago more than a thousand miles from the court room. Isn't the right of the defendant to have a trial by a jury of those in the county, which means in the community. That constitutional right exists by reason of the very great law that if justice be done, the defendant is entitled to bring his witnesses into the courtroom. It is true that counsel advised us of their intention to offer this evidence. It is also true that we were firmly convinced that the evidence could not be gotten under any conceivable set of facts, and being so convinced, we had *a*no reason to anticipate that your Honor's views would differ from ours——
>
> "The Court: I don't think you are really right on that, Mr. Clark. If you wanted to do it you should have said, 'We have the testimony and we want a continuance to get it.'
>
> "Mr. Clark: Well, outside of the burden of a strenuous trial, where counsel have the responsibility of a man's life upon their shoulders, they can do just one thing at one time. They have to concentrate on all the facts that are being produced. Among the three counsel who are representing the defendant here, we could not be expected to go to Colorado Springs. If we had the time and the money perhaps we could do that. Those things we have not, and we had no need for the deposition until we reached this stage of the case. I

> will take the broad position that where, as here, an attempt is made to prove the issues of another crime largely separated from the place of trial, and largely separated from the time of trial, that when that attempt is made then the defendant has a right to a reasonable continuance in order to get that evidence which he cannot reasonably get now, and which he should have. He doesn't know from the Indictment hat he was going to have that evidence to get." (R. 688, 689.)

The question here is one of a mere error in the Court's ruling. With this we are not now concerned. The issue is far more fundamental, namely, the right of an accused to be tried only in the community where the crime is alleged to have been committed and where he has the processes of the Court available to him to bring in all matters which may and do aid in his defense; to be notified in advance of the trial of just what he is expected to meet, and to be given the opportunity to be prepared and to meet it. These are fundamentally such clearly announced principles of due process of law that they hardly require citation of authorities.

In *Snyder* v. *Massachusetts*, 291 U. S. 97, this Court stated that the right of confrontation of witnesses is assumed to be within the scope of the 14th Amendment to the United States Constitution. But how can one avail one's self of the right if no processes of the Court are available to bring in witnesses, and if the state, with its great power and wealth, is able to bring in and does bring in numerous witnesses from another state without affording the defendant the opportunity of meeting the testimony of those witnesses, either by direct confrontation or by a continuance for the purpose of taking a deposition if one could be secured?

This Court has repeatedly held that where process is served outside of a state on a non-resident, such process

is void and fails to bring the person or the subject-matter within the jurisdiction of the Court of another state.

Galpin v. *Page*, 18 Wall. 350;
Pennoyer v. *Neff*, 95 U. S. 714.

It is far more essential where life is at stake that the Court attempting to act should have jurisdiction of the subject-matter and that the parties have the processes of the Court available so that they may be confronted with the witnesses and be able to secure evidence that will vindicate them. A denial of these rights is a denial of fundamental and immutable principles of justice. These are doctrines, rights and common justice that inhere in the nature of due process of law and are guaranteed and protected by the 14th Amendment to the Constitution of the United States.

Baldwin v. *Hale*, 1 Wall. 223, 233;
Twining v. *New Jersey*, 211 U. S. 78, 110.

The necessity of due notice and an opportunity of being heard are among the immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard. Judgment without notice and opportunity to be heard wants all the attributes of a judicial determination; it is judicial usurpation and oppression and never can be upheld where justice is justly administered. Notice and hearing are preliminary essentials to the passing of an enforceable judgment; they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law.

Powell v. *Alabama*, 287 U. S. 45, 68 (1932);
Galpin v. *Page*, 18 Wall. 350, 368, 369 (1874);
Frank v. *Mangum*, 237 U. S. 309, 340 (1915).

Boundaries of a state determine the state's jurisdiction of the Court.

U. S. v. *John*, 17 L. Ed. 225, 226.

Crimes are local if committed within the state. It has been held that they must then be tried in the district in which the offense was committed, at least in federal courts.

U. S. v. *Dawson*, 15 How. 488;
Sixth Amendment to the United States Constitution.

In California jurisdiction of felonies is confined to the county of their commission and the sheriff of the county is required to subpoena any witnesses for either side. (Sections 1326-1331 Penal Code of California.) No such process existed at the time of trial of Lisenba from California into the State of Colorado.

In *Snyder* v. *Massachusetts*, 291 U. S. 96, 78 L. Ed. 674, 689, Mr. Justice Roberts said:

> "In whatsoever proceeding, whether it affect property or liberty of life, the 14th Amendment commands the observation of that standard of common fairness, the failure to observe which would offend men's sense of decencies and proprieties of civilized life. It is fundamental that there can be no due process without reasonable notice and a fair hearing."

Hurtado v. *California*, 110 U. S. 516, 524, 532, 28 L. Ed. 232, 235, 237, 4 S. Ct. 111, 292;
Iowa Central Rrd. Co. v. *Iowa*, 40 L. Ed. 467;
Simon v. *Craft*, 182 U. S. 427, 436, 45 L. Ed. 1165, 1170, 21 S. Ct. 836;
Holmes v. *Conway*, 241 U. S. 624, 60 L. Ed. 1211, 36 S. Ct. 681;
Hagar v. *Reclamation Dist.*, 111 U. S. 701, 708, 28 L. Ed. 569, 572, 4 S. Ct. 663;
Hooker v. *Los Angeles*, 188 U. S. 314, 318, 47 L. Ed. 487;
Twining v. *New Jersey*, 211 U. S. 78, 111, 53 L. Ed. 97, 111, 29 S. Ct. 14.

IV.

The principal testimony against the defendant was that of an alleged accomplice named Charles S. Hope, who received leniency for his testimony. To be sufficient under the laws of California it had to be corroborated as required by Section 1111 of the Penal Code of California, and there was no corroboration. Since the trial the said Charles H. Hope has made affidavits and filed the same in the Superior Court of Los Angeles County, stating that his testimony was obtained by deceit, fraud, collusion and coercion and was entirely false: that he was impelled by force and fear, threats and promises, and that all these facts, including the falsity of his statements, were known to the prosecution and participated in by them. The use of such testimony, thus obtained, and the conviction based thereon, make the entire trial a mere pretense, and is in violation of due process of law and the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States.

Charles H. Hope filed affidavits in the Superior Court which we in turn filed in the Supreme Court of California in this case on petition for rehearing. These affidavits were not denied nor has any averment therein been questioned. They allege fraud on the part of the state. They admit that Hope committed perjury through coercion. They state that his testimony regarding the snakes "was all the bunk," and specifically repudiated it.

The Court took no official action upon these affidavits. The facts therein set forth vitiate the judgment under the principles laid down in *Mooney* v. *Holohan*, 94 U.S. 102, 79 L. Ed. 794. The use of Hope's testimony under the circumstances constituted a denial of due process of law by the Supreme Court of the state through its agents.

Twining v. *New Jersey*, 211 U. S. 78, 53 L. Ed. 97, 29 Sup. Ct. Rep. 14;

Moore v. *Dempsey*, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. Rep. 265;
Snyder v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674, 54 Sup. Ct. Rep. 330;
Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55;
Mooney v. *Holohan*, 94 U. S. 102, 79 L. Ed. 347;
Chicago, B. and Q. R. R. v. *Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581;
Carter v. *Texas*, 177 U. S. 442, 44 L. Ed. 839, 20 Sup. Ct. Rep. 687;
Ex parte Commonwealth of Va., 100 U. S. 339, 25 L. Ed. 676.

Under the circumstances petitioner was denied due process of law in that the trial Court possessed no jurisdiction to enter judgment.

In re Nielsen, 131 U. S. 176, 33 L. Ed. 118;
In re Bonner, 151 U. S. 242, 38 L. Ed. 149, 14 Sup. Ct. Rep. 323;
Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55.

Petitioner was denied equal protection of the law.

Smith v. *Texas*, 85 L. Ed. 106.

The decision of the Supreme Court of California is itself therefore a denial of due process of law and the equal protection of the laws, as to all the points heretofore and hereafter enumerated.

Snyder v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674, 54 Sup. Ct. Rep. 330;
Twining v. *New Jersey*, 211 U. S. 78;
Rogers v. *Peck*, 199 U. S. 425;

Maxwell v. *Dow*, 176 U. S. 581;
Hurtado v. *California*, 110 U. S. 516;
Frank v. *Mangum*, 237 U. S. 309;
Powell v. *Alabama*, 287 U. S. 45;
Mooney v. *Holohan*, 94 U. S. 102, 79 L. Ed. 347;
Chambers v. *Florida*, 309 U. S. 227, 84 L. Ed. 716;
White v. *Texas*, 310 U. S. 530, 84 L. Ed. 1342;
Canty v. *Alabama*, 309 U. S. 629, 84 L. Ed. 988;
Brown v. *Mississippi*, 297 U. S. 278, 80 L. Ed. 682;
Smith v. *Texas*, 85 L. Ed. 106.

In *Mooney* v. *Holohan*, 79 L. Ed. 794, this Court said:

"Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. *Herbert* v. *Louisiana*, 272 U. S. 312, 316, 317, 71 L. Ed. 270, 273, 47 S. Ct. 103, 48 A. L. R. 1102. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative of-

ficers.' *Carter* v. *Texas*, 177 U. S. 442, 447, 44 L. Ed. 839, 841, 20 S. Ct. 687; *Rogers* v. *Alabama*, 192 U. S. 226, 231, 48 L. Ed. 417, 419, 24 S. Ct. 257; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 233, 234, 41 L. Ed. 979, 983, 984, 17 S. Ct. 581."

V.

The defendant was held incommunicado, without his attorney having been sent for, in custody in a private home, although prior to the alleged confession he requested that his attorney be sent for. This request was denied to him and he was thereafter questioned incessantly, without food and rest, without the knowledge of his attorney and without his attorney being advised of the same. The deprivation of the right of counsel at this and other stages of the proceedings and the use of statements thus obtained constitute a violation of due process of law and the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States.

The denial of the defendant to the right of counsel from the very beginning of his arrest was a denial of due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

The Constitution of California, Article I, Section 8, provides as follows:

"Pleading Guilty Before Magistrate.

"Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. When a defendant is charged with the commission of a felony, by a written complaint subscribed under oath and on file in a court within the county in which the felony is triable, he shall, without unnecessary delay, be taken be-

fore a magistrate of such court. The magistrate shall immediately deliver to him a copy of the complaint, inform him of his right to the aid of counsel, ask him if he desires the aid of counsel, and allow him a reasonable time to send for counsel; and the magistrate must, upon the request of the defendant, require a peace-officer to take a message to any counsel whom the defendant may name, in the city or township in which the court is situated. If the felony charged is not punishable with death, the magistrate shall immediately upon the appearance of counsel for the defendant read the complaint to the defendant and ask him whether he pleads guilty or not guilty to the offense charged therein; thereupon, or at any time thereafter while the charge remains pending before the magistrate and when his counsel is present, the defendant may, with the consent of the magistrate and the district attorney or other counsel for the people, plead guilty to the offense charged or to any other offense, the commission of which is necessarily included in that with which he is charged, or to an attempt to commit the offense charged; and upon such plea of guilty, the magistrate shall immediately commit the defendant to the sheriff and certify the case, including a copy of all proceedings therein and such testimony as in his discretion he may require to be taken, to the superior court, and thereupon such proceedings shall be had as if such defendant had pleaded guilty in such court.

"The foregoing provisions of this section shall be self-executing. The Legislature may prescribe such procedure in cases herein provided for as is not inconsistent herewith. In cases not hereinabove provided for, such proceedings shall be had as are now or may be hereafter prescribed by law, not inconsistent herewith.

"A grand jury shall be drawn and summoned at least once a year in each county."

The California statutes provide that when an accused is arrested he shall be taken without unnecessary delay before

the nearest or most accessible magistrate in the county in which the arrest is made. (Section 859, California Penal Code.) Upon the request of the defendant the magistrate must require a peace officer to take a message to any counsel in the township, without delay and without fee. Sections 145, 147 and 149 of the California Penal Code provide substantial fines and terms of imprisonment for peace officers who disregard their duties.

Section 825 of the California Penal Code provides as follows:

> "Time within which defendant must be taken before magistrate: attorney may visit prisoner: Refusal to permit visit a misdemeanor: Forfeiture and recovery thereof. The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; and after such arrest, any attorney at law entitled to practice in the courts of record of California, may at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of the prisoner so arrested who willfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor. Any officer having a prisoner in charge, who refuses to allow any attorney to visit the prisoner when proper application is made therefor shall forfeit and pay to the party aggrieved the sum of five hundred dollars, to be recovered by action in any court of competent jurisdiction."

The section requiring due process of law under the 14th Amendment to the Constitution of the United States means that due process of law must be accorded by every agency of the state. Under California statutes due process of law requiring that a person be given an attorney immediately after his arrest upon his request is a requirement that was not fulfilled in this case. The denial therefore, of the right

of counsel at this stage of the proceedings, immediately after his arrest, was a denial by the peace officers having charge of him of due process of law. He was entitled under the laws of the State of California to counsel at all times after his arrest. Due process may be denied by any agency of the State acting arbitrarily. (*Mooney* v. *Holohan*, 294 U. S. 103; *Powell* v. *Alabama*, 287 U. S. 45).

The record shows that the defendant in this case was held incommunicado for two days and nights in a private home, without being taken before the nearest and most accessible magistrate and without being allowed the counsel of his choice. The officers, as agents for the State acted arbitrarily and in violation of appellant's fundamental rights. Thereafter he was held in the jail, in the "High Power Tank," and was constantly under observation and his counsel visited him only once. The district attorney and the investigating officers were on notice that the defendant had counsel of his own choice at this time and all times thereafter.

Cannon 9 of Cannons of Professional Ethics of the American Bar Association, Cases of Legal Ethics, page 574, provides:

> "9. Negotiations With Opposite Party. A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

Rule 12, Rules of Professional Conduct, 204 Cal. xciii, states as follows:

> "A member of The State Bar shall not communicate with a party represented by counsel upon a subject of

controversy, in the absence and without the consent of such counsel."

Defendant's counsel was entitled to notice of all proceedings and the officers violated the defendant's right to counsel when they removed him from the jail without notice to his counsel or without knowledge of his counsel that this was being done and interrogated him in the absence of counsel. The district attorney had no right to have interrogated the defendant without the presence of his counsel. It was the defendant's right to be left alone and not be contacted or communicated with by opposing counsel, and not to be questioned without the consent or knowledge of his counsel. No rule of conduct is more firmly intrenched than that an attorney shall not communicate with the client of another attorney without such other attorney's knowledge or consent.

The defendant asked the officers to call Russell E. Parsons, another attorney representing him, before he made the alleged confession to the district attorney. This was definitely refused and appellant was told it would take too long to inform Parsons about the case. The people were thus further put on notice that the defendant desired his attorney present to advise him.

The deprivation of the right of counsel at this stage of the proceedings, in accordance with the provisions of California law entitling a defendant to counsel from the very inception of an arrest, was a deprivation of due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

Powell v. *Alabama*, 287 U. S., 77 L. Ed. 158;
People v. *Simpson*, 31 Cal. App. (2d) 267.

While this Court has heretofore held that it is a denial of due process of law to deprive a person of right of counsel in his trial, yet here we have a situation in which the de-

fendant is entitled to counsel from the very outset of his arrest, according to the Constitution and laws of the State of California, but was deprived of that right. This deprivation of the right of counsel therefore, at this stage of the proceedings when it would have been of most benefit to him, is equally a denial of due process of law. It would be utterly futile to provide for counsel in the trial of a case if the defendant could not have the right of counsel from the very outset of his arrest so that he might be protected from unlawful assault, improper interrogation, the use of the methods of the thumbscrew, the rack, and the torture chamber, to which he was subjected and by means of which the purported confession was extorted from him.

The denial of the right to have his counsel was a denial of equal protection of the laws, since other prisoners, similarly situated, are granted the right to counsel from the inception of an arrest.

Article I, Section 8, Constitution of California;
Section 825, Penal Code of California;
Maxwell v. *Dow*, 176 U. S. 581, 44 L. Ed. 597, 20 S. Ct. 448, 494;
Yick Wo v. *Hopkins*, 30 L. Ed. 200;
Smith v. *State of Texas*, 85 L. Ed. 106.

> "Equal protection of the laws must be given,—not merely promised."
> *Smith* v. *State of Texas*, 85 L. Ed. 106.

During the trial of the case evidence was introduced in the case regarding an alleged accusatory statement made to the defendant when he was in custody in the county jail in which the district attorney read to him a purported statement of Hope and asked him if he had anything to add to the statement. Defendant was at the time without benefit of counsel, although the district attorney and his deputies knew that he was then represented by counsel. His failure

to reply under such circumstances should not have been used against him (R. 1071. The use of evidence regarding this circumstance was a violation of law guaranteed by the 14th Amendment to the Constitution of the United States.

VI.

The defendant was denied the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States.

In *Yick Wo* v. *Hopkins*, 30 L. Ed. 200, at 227, this Court said:

> "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

California law providing for the right of counsel from the very commencement of one's arrest for crime and that the defendant shall be taken immediately before the nearest and most accessible magistrate and given the benefit of counsel at all times thereafter, and that the defendant thereafter be tried in a due and orderly fashion according to the law of the land, is fair and impartial in appearance. Yet in this case it was applied and administered by the officers of the law, acting as the agents of the State, with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between this defendant and persons in similar circumstances, material to his rights, and denied to him equal justice. Such denial "is still within the prohibition of the Constitution" of the United States, in accordance with the principles above laid down in the *Yick Wo* v. *Hopkins* case.

It was with an evil eye that the officers took the defendant to a private house next door to his home and showed him dictograph apparatus for its "psychological effect" upon him.

It was with an unequal hand that the seasoned officer in charge of the investigation, Officer Southard, admittedly committed a battery upon this defendant.

It was unjust discrimination to bring in a confession obtained by third degree methods which are forbidden by the laws of the State and the nation and contrary to California's own decision in *People* v. *Dye*, cited heretofore, and use this confession against him.

It was unjust discrimination to bring in the horrifying spectacle of rattlesnakes, sounding eerily their death knell to this defendant--a sound that reached the passions and prejudices of the jurors as though they had been pierced by the fangs of the snakes themselves.

It was a denial of equal justice to try this defendant upon matters existing in the State of Colorado, of which he had no notice or opportunity to defend.

It was unjust to convict this defendant and to allow the conviction to stand upon testimony admittedly perjured and known by the officers to be perjured.

It was an unfair discrimination to deprive this defendant of his attorney and to question him without the knowledge or consent of such attorney when the State was put upon notice that the defendant had such counsel.

Equal justice requires that all persons in like situations be treated alike. This right is in its nature fundamental in the protection by the government and State of the enjoyment of life and liberty.

In *Caldwell* v. *State of Texas*, 137 U. S. 692, 34 L. Ed. 816, it was held that no State can deprive particular persons or classes of persons of equal and impartial justice under the law without violating the provisions of the 14th Amendment

to the United States Constitution, and that due process of law, within the meaning of the Constitution, is secured when the laws operate on all alike and no one is subjected to partial or arbitrary exercise of the powers of government.

In *Leeper* v. *State of Texas*, 139 U. S. 462, 35 L. Ed. 225, the court said:

> "'that by the Fourteenth Amendment the powers of states in dealing with crime within their borders are not limited, except that no state can deprive particular persons, or class of persons of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process and when secured by the law of the state the constitutional requirement is satisfied, and that due process is so secured by laws operating on all alike, and not *subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice*. Hurtado *v.* California, 110 U. S. 516, 535, 28 L. Ed. 232, 238, 4 Sup. Ct. Rep. 111, 292, and cases cited.' See also, for statement as to due process of law the cases of *Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Hagar* v. *Reclamation Dist.*, No 108, 111 U. S. 701, 707, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663." (Italics added.)

The powers of government were arbitrarily exercised in the kidnaping of Lisenba and taking him to a private house next door and there detaining him in custody without any warrant or authority of law, and thereafter subjecting him to a course of constant and persistent questioning, physical violence, threats, injuries and suffering.

It was an arbitrary exercise of the powers of the State, through its courts, to permit evidence to be brought in at the expense of the great and powerful State of California from another State more than a thousand miles away, with no opportunity to the accused individual to meet or defend against it.

It was a partial and arbitrary exercise of the powers of government to deprive the accused in this case of the right of counsel at every stage of the proceedings from the time of his arrest.

It was to prevent such arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice that the 14th Amendment was adopted.

Hurtado v. *California*, 110 U. S. 513, 535, 28 L. Ed. 232.

The late Associate Justice Seawell of the Supreme Court of California said:

> "It can be said without fear of overstatement of the fact—if the circumstance is of sufficient importance to merit mention of our judicial records—that in no case which has come to the attention of this Court for review, in its entire judicial existence, has the spectre of weird, ghastly and unnatural wickedness, from first to last, stalked a judicial proceeding in such hideous forms as are set forth in the presentation of the instant case on behalf of the People." (R. 982.)

The essence of due process of law in America is its safeguard—a fair trial.

Chambers v. *Florida*, 309 U. S. 227, 84 L. Ed. 716.

Conclusion.

The appellant, subjected to the third degree, tried in an atmosphere of hissing, writhing rattlesnakes, with a mass of testimony brought from another State more than one thousand miles away without the benefit of notice or an opportunity to prepare a defense, deprived of counsel and convicted upon perjured testimony, has been denied due process of law guaranteed by the 14th Amendment to the Constitution of the United States. For the same reasons he has

been denied the equal protection of the laws guaranteed by this amendment.

For each of these reasons he has been denied a fair trial and equal and impartial justice under the law.

WHEREFORE, upon each and all of the above grounds he respectfully prays that the judgment be reversed.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Appellant.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 133

MAJOR RAYMOND LISENBA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

PETITIONER'S REPLY BRIEF.

MORRIS LAVINE,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 133

MAJOR RAYMOND LISENBA (ROBERT S. JAMES),
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

CLOSING BRIEF.

To the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices Thereof:

Respondent has filed a lengthy brief failing to meet the issues raised by this appeal, and overlooking or misstating essential facts disclosed by the record.

Nowhere has respondent pointed out any criminal agency to produce death by drowning. This is the *corpus delicti* in the case which must be proved beyond a reasonable doubt—(1) criminal agency as the means producing (2) death by drowning. And there is no such proof in the record. Only the extrajudicial statement of Hope that James told him that he, James, drowned Mrs. James, raises even a

suspicion in the actual evidence that any such thing occurred. There is no evidence of the fact itself.

That there was no scintilla of evidence of criminal agency until the Hope confession is conceded by respondent in its brief (R. Br. Pgs. 4 & 5) wherein it says:

"No prosecution was commenced for the crime of murder until May 6, 1936 (R. 815) *because proof of the criminal agency producing the death of Mary James was not discovered until after Hope was arrested and questioned on May 1, 1936* (R. 469, 630, 631)." Italics appellant's.

Respondent's brief recited from pages 1 to 29 a "recitation of the evidence" "without reference whatsoever to the contents of any alleged confession of James." This recitation contains no single fact upon which a conviction of murder *by drowning* could be sustained.

The respondent then adds:

> "The confessions proved James guilt of the murder of Mary James beyond peradventure."

It follows, therefore, that the conviction of James, and his sentence to death, was the result of the "third degree" confessions, wrung from James, and introduced in evidence against him. That his trial was unfair and un-American through the use of these confessions and through the spectacular and unnecessary bringing into the courtroom of live, hissing, writhing rattlesnakes, and the production of evidence from the State of Colorado more than a thousand miles away without notice and without an opportunity to defend against it, and the use of an accusatory statement as an implied admission of guilt when the defendant was without benefit of counsel, and the widespread use of evidence unrelated to this case but tending to degrade this

appellant in the eyes of the jury, is demonstrated by the voluminous record in this case.

And respondent deemed it necessary to use all of these unfair methods in order to obtain the conviction of appellant for murder *by drowning*.

Respondent spent much time in his brief to discuss James' interest in life insurance, the life and habits and rattles of rattlesnakes, the alleged incest charge, the episode with Madge Reed, and the Colorado evidence even to the point of diagramming it, and other irrelevant matters, none of which in any way prove or tend to prove *murder by drowning*, and all of which is immaterial to prove the issues before this Court, to-wit:

WAS PROCEDURAL DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION VIOLATED IN THIS CASE?

Procedural due process, says this court, speaking unanimously through Mr. Justice Hugo Black in *Chambers* v. *State of Florida*, 309 U. S. 227, 236, 237, "evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there has been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power."

Again the court says:

"We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The constitution proscribes such *lawless means irrespective of the end.*" Italics ours.

And in *Snyder* v. *Massachusetts*, 78 L. Ed. 695, Mr. Justice Roberts, in describing the true meaning of procedural due process says:

"A distinction has always been observed in the meaning of due process as affecting property rights, and as applying to procedure in the courts. In the former aspect the requirement is satisfied if no actual injury is inflicted and the substantial rights of the citizen are not infringed, the result rather than the means of reaching it is the important consideration. But where the conduct of a trial is involved, the guarantee of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way. Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules, and is not satisfied, if, though the hearing was unfair, the result is just."

We have pointed out in our opening brief how in the use of the alleged confessions, the bringing in of the live snakes, the use of Colorado evidence, the use of perjured testimony, and the deprivation of rights of counsel the case was not "fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power" and that certain fundamental rules of fairness were not observed.

Respondent has replied with a concentrated effort to prove the petitioner's guilt, rather than with the question of whether *due process* was observed in the trial and a fair trial accorded. We did not discuss this question of innocence in the opening brief, but lest silence be misunderstood, we will point to evidence that is convincing of appellant's innocence, and to the lack of evidence to overcome the presumption of innocence with which all persons charged with crime in America are clothed, and lack of competent legal evidence to satisfy anyone beyond a reasonable doubt such as the law requires before a guilty verdict can be sustained.

The Factual Misstatements by Respondent.

Misstatement No. 1.

Respondent charges petitioner with conjuring up the testimony that District Attorney Buron Fitts shortly before the confession threatened him. The record discloses the following:

> "Now prior to your making this statement down in the office of the District Attorney did you have any particular conversation with Mr. Fitts?
>
> "A. I did.
>
> "Q. What, if anything, did he say to you?
>
> "A. He was the one that was doing most of the talking. Do you want me to tell you what he said?
>
> "Q. Yes, tell us what he said. I don't believe you covered that fully.
>
> "A. Well, he read Hope's story over to me many, many, times and asked me what I knew about it, and I told him I knew nothing about it. He questioned me and questioned me about different things in Colorado, and everything else and I told him I knew nothing about it. He continued to question me until later on in the evening. I was very sick. I was hungry. I was tired, and I told him a thousand times that I didn't know anything about Hope's story. About 10:00 or 11:00 o'clock he began to get pretty rough with me. He said, 'Now you have heard the story over and over, and we are going to clean it up, and you had just as well tell me now, because we will be sitting here until Monday morning.' I still told him that I didn't know anything about the story; I had never heard of any rattlesnakes; I had never seen one, and that the whole story sounded screwy to me, and that I didn't understand the story. He told me that everybody in town was trying to storm the jail, that he had officers going around getting shotguns, going to keep the mob from lynching me. He tried to frighten me that way, and I told him that I didn't know anything about the story. About 12:00 o'clock all of the officers—there were about

> 15 or 20 around there all evening,—cleared the room and sent Mr. Jack Southard in to talk to me, and you heard me tell just what Jack Southard told me he was going to do if I didn't give them the statement, and admit the things they wanted me to admit. I didn't know the story. I had heard it. I had heard them tell it over and over and over, and when they told me that they was going to take me out to that house, and what they was going to do to me, I told them that if they wouldn't do it, I would try to tell them the story as I had heard it, and when I did try to tell them the story, every time I would get off the story one of the officers would stop me, and say, 'Didn't this or that happen?' which I had promised them I would tell if they didn't take me out there and punish me any more. * * * They (the statements) were given by me to end further questioning. There was none of it true" (R. 735-736).

When asked if he did not at the first appearance in court thereafter enter a plea of not guilty, the court sustained an objection to the question.

Respondent says the above statement was given for "the purpose of trying to bring his case within some of those which have been decided by this Honorable Court" (Resp. Br. 130). But respondent has forgotten that this case was tried in June and July of 1936 and judgment pronounced Sept. 10, 1936. No case at that time had been decided by this Honorable Court holding that confessions obtained by third degree methods violated the Fourteenth Amendment to the Constitution of the United States. *Brown* v. *Mississippi*, written by Mr. Chief Justice Hughes, was decided in 1937. *Chambers* v. *Florida*, and *White* v. *Texas*, written by Mr. Justice Hugo Black, and the *per curiam* decision on *Canty* v. *Alabama* were decided in 1939. Hence no thought could have or were given to these cases which had not even occurred when petitioner was already condemned to death.

But there was no denial by District Attorney Fitts either that he had threatened petitioner on this occasion or that he had questioned him continuously, going over the story over and over again, as James testified. In fact Officer Southard (R. 469-470) and Officer Killion testified to the continuous questioning in District Attorney Fitts' office (R. 674 *et seq.*), and the questioning lasted from three o'clock in the afternoon until 3 in the morning. Nor did Mr. Stewart, who claimed to be present most of the time while Fitts was questioning petitioner, deny these threats by Fitts, nor the repeated going over and over again of the story (R. 587 *et seq.*). Respondent was meticulous in having all other things denied. THESE STATEMENTS AND THREATS BY FITTS REMAIN UNDENIED BY HIM. Fitts did keep appellant out of jail and in his office without benefit of counsel and did persistently question him and browbeat him until the alleged confessions were forthcoming, corroborating in fact what James says he threatened to do until the confessions were forthcoming.

Misstatement No. 2.

Respondent says: "The evidence of the people given on voir dire examination overwhelmingly refutes the contention of petitioner herein made at the trial that he was beaten, threatened, frightened, questioned until he fainted, and confessed because of fear of a recurrence of such beatings. Such evidence further refuted his contention that he was deprived of sleep and food and of his right of counsel" (Resp. Br. pg. 32).

The record discloses as follows:

Was the Defendant Beaten?

Officer Southard admits that he struck James (R. 464). While on direct examination by petitioner's counsel he claimed it was "in the other case" (R. 464) he testified on

examination by the district attorney that the "slap" occurred when he was discussing the death of Mary James in the fish pond (R. 477). The slap was of sufficient degree for Officer Griffen to say "Take it easy Jack." according to Griffen's own testimony (R. 556).

The petitioner who denied making any remark as Southard claimed described the beating as follows:

> "Finally he (Southard) said that I was lying like a dog and he began to beat me * * * He jumped over and began to beat me, and I got hold of him, and he stopped, and then he jumped over and began beating me again. When I stopped him Charlie Griffen knocked me loose. I told them that I had answered every question, and I didn't know what they were talking about when they were talking about this woman. And he began to question me about it again, and then several minutes later he did it again, and I grabbed hold of him again and Charlie Griffen knocked me loose. I said, 'There is no use to beat me.' I told them if they wanted me to say that I stayed in the hotel with this woman I would say it. They were not satisfied with that. If they asked me a question, and if I answered it he hit me, and if I attempted to explain, or did not answer, he would hit me. And he turned me over in that chair several times" (R. 492).

James says he was black and blue from his waist up, that he was made hard of hearing, and both ears were swollen (R. 494).

Attorney Silverman, who saw James in the attorney room of the jail four or five days afterwards, observed that both of his ears were blue and swollen (R. 482).

Ethel Smith, who saw him in jail after his arrest and was two or three feet away, observed that one ear was very red and badly swollen and the other ear was real red (R. 512).

Officer Southard evasively admitted that the left ear might have been swollen some days after the arrest (R.

464), and Griffen said that James complained about his ears.

James says he got a hernia as a result of the beatings administered to him. Dr. James De Witt George said that he examined the defendant before he was lodged in jail and he had no hernia and he examined him in jail and he had a hernia (R. 461-462).

James complained to Chief Deputy District Attorney Stewart that he had been struck (R. 594).

James also said, "Well, they finally quit beating me some time in the night, and then Mr. Williams takes hold of me and told me if I confessed I would get less punishment, and that I might get a life sentence. I told him that I couldn't tell him anything about it" (R. 492, 493).

Was James Threatened?

It was a threat to take James next door to a private house instead of before the nearest and most accessible magistrate as required by Section 849 of the Penal Code of California.

It was a threat to keep him in this house for two days and nights, except when he was taken to the district attorney's office friendless, without counsel, and questioned incessantly, instead of being booked in jail.

It was a threat to keep him seated in a chair for two days and nights without sleep.

It was a threat to question him in relays of four hours each.

It was a threat not to send for counsel as first requested.

It was a threat, when on May 2, 1936, petitioner was removed from his cell to a private room called the Chaplain's room, not to notify his counsel or have such counsel present, and then to bring Charles Hope into the room, handcuffed to Southard, and to accuse petitioner of the

alleged crime. (See *Bram* v. *U. S.*, 168 U. S. 557; 42 L. Ed. 558.)

It was a threat to take James from the jail in custody of the officers to the unhappy scene where James' wife had been found drowned in the fish pond—a scene which originally necessitated calling the doctor to give James treatment because he was so sick, and his grief so great. (See *Ziang Sung Wan*, 266 U. S. 1; 69 L. Ed. 131.)

It was a threat to take him to the district attorney's office and question him incessantly thereafter, until he called for food and promised to tell the "story" if they would take him out and buy him some dinner.

It was a threat that District Attorney Fitts uttered that he would keep him there until Monday unless he told the story and that he kept repeating the story over and over again (R. 734) and undenied by Fitts.

It was a threat that Southard told petitioner he might just as well confess killing his wife or they were "going to beat the Hell out of" him (R. 489). (See cases cited in *Bram* v. *U. S.*, 168 U. S. 557; 42 L. Ed. 588.)

Mr. Fitts at no time denied that he made threats to James, as James claimed, nor did anyone else deny that Fitts had made them. The fact of the beatings having been so well established that fact itself is a corroboration of James' testimony regarding the threats.

Officer Southard admits that Fitts said to James in substance that James had better clear the whole thing up and save a lot of expense, but Southard claimed that Fitts' statement was made with reference to another case (R. 468).

Was James Frightened?

James testified as follows: "Every time: * * * every time I would get off the story one of the officers would stop me, and say, 'Didn't this or that happen?' which I had

promised them I would tell if they didn't take me out there and punish me any more (R. 735).

He also testified on *voir dire* examination: "I told him (Southard) that I was ill from the beating that I had taken before, that I wasn't able to take another beating and that if he wanted me to say what he was relating to me in Hope's story there that I would gladly admit it and save myself other punishment" (R. 497).

Since James was severely beaten and threatened it requires no corroboration of his own testimony to deduce that he was frightened. The testimony of several officers that James appeared cool and collected and calmer than they were would leave the necessary inference that none of them were calm. The fact that there were from fifteen to twenty officers all around this helpless man, whom Dr. Paul Bowers testified was of sub-normal mentality, and that he was fearful and alone in the face of most grave accusations, and that the men who had beaten and threatened him were present, was sufficient to frighten him or any individual in his same position.

Was James Questioned Until He Fainted?

James testified as follows:

"Q. And how long after talking to Mr. Williams, how long was it after that that you were taken to the County jail?

A. About the time that Mr. Williams got through talking to me I collapsed, and I didn't know anything until the next day.

Q. You mean that you fainted?

A. Yes, I fainted, or passed out.

Q. At what time the next day, as near as you can tell us, was it that you regained consciousness?

A. Well, I came to the next morning. I think it must have been 8:00 or 9:00 o'clock.

Q. Were you at the same place?

A. Yes, sir.

Q. Were the same people there?

A. Well, I don't just remember who was there. There was an officer named Davis there. Whether Mr. Southard and Griffen were there, I don't know.

Q. Now, were any further threats made to get you to make a statement concerning the facts of your wife's death while you were at the house—we have got to the point now where you regained consciousness——

* * * * * * *

Q. Were any further questions asked you by anyone concerning the circumstances of your wife's death, after you regained consciousness, and before you were taken to the County jail?

A. Well, I was pretty groggy when I regained consciousness, and I hardly remember what was said there" (R. 493).

Officer Southard himself furnished some measure of corroboration when he said that James in answer to some of his questions "just looked at me blankly." Later Officer Davis, in answer to a question by defense counsel, testified as follows:

"Q. And it is a fact, is it not, that as he sat in this chair and he put his feet on another chair, the man finally fell over and went to sleep, that is a fact, isn't it? * * *

A. I will say that he went to sleep. He didn't fall over" (R. 584).

This at least is corroborative of the fact that at four o'clock in the morning, while still sitting on a chair, the defendant, from sheer exhaustion had passed out. James had been questioned in relays of four-hour shifts. The start of the interrogation and the psychology of the attempted fright

upon James was initiated when he was first arrested, and when Southard took "quite a crowd" to James' house to make his arrest (R. 480).

Officer Southard said as follows:

"Q. Now, you spoke about taking Mr. James from the house where he was living to the house adjoining where he was living, where you had some dictograph.

A. Where we had the receiving set of the dictograph.

Q. Who was with you at that time?

A. There was quite a crowd. There was a number of newspaper men. Mr. Fitts was there, and Deputy District Attorney Eugene Williams, Scott Littleton, Everett Davis, I believe was there, and Harry Dean.

Q. Do you mean that all those people were there at the time the arrest was made?

A. Well, I had quite a crowd out there to make the arrest, yes, sir; it was quite a large house to cover" (R. 480).

The questioning continued in relays of four hours each. Officers occupied the beds in the front part of the house, and took turns in sleeping and interrogating James. All of them were members of the District Attorney's staff. Griffen and Southard occupied the front bedrooms; the other officers were in separate bedrooms in the middle of the house (R. 585). Various officers came in and took turns in relieving the officers who were questioning James. These included Lieutenant Kynette of the Los Angeles Police Department, who came there at six or six-thirty in the morning and went out with Davis and the officers and the defendant (R. 586). Hence, James was actually subjected to questioning by officers, in relays, from shortly after the time of his arrest for at least 48 hours, excepting only at most about two and one-half hours after he fell asleep from sheer exhaustion.

On May 2nd at about eleven or eleven-thirty, Deputy

District Attorney Williams, in charge of the prosecution of the case, came to the county jail and had James removed from the "High Power Tank" to the office of the jail Chaplain by Officer Killion, and James was there told of Hope's purported confession. This was in accordance with a plan which had been made before between investigators of the District Attorney's office and Mr. Williams (R. 621). James' attorney was not notified (R. 621). James had been instructed not to talk to anyone without Mr. Silverman being present (R. 482).

Mr. Williams and the squad of investigators persisted in their statement to James and took down his refusal to "add anything" to Hope's statement by a stenographer and in the presence of a group of investigators. Without notifying Silverman, James was then removed from the county jail by Officer Killion. The very first thing James did upon his removal from the jail was to ask Killion if they would give him something to eat. Officer Killion said he "remembered that we talked something about having something to eat, and we decided we didn't have time to stop for that" (R. 670).

James was taken to the scene of the fish pond. Silverman was not informed and no friend of James knew that he was taken there (R. 671). Mr. Williams was there at the fish pond and many newspaper men (R. 670). James was not told why he was being taken to this scene. He was taken back to the District Attorney's office by Killion (R. 673). There were many people in the room. James was asked to tell his side of the story.

The Trip to the Fish Pond Scene Where Mrs. James Died.

WILLARD L. KILLION testified:

Q. Now, you did get to 1329 Verdugo Road, I believe you stated heretofore. When you got there did you take Mr. James any place about the premises?

A. Yes, sir.

Q. Where did you take him?

A. To the back part of the premises near the garage and to the side of the fish pond.

Q. Did you have any conversation with him there at the fish pond?

A. As I recall it, the conversation had with him there was in asking him at what point on the edge of the pond—no, I am mistaken in that. It was Hope that was asked that question. I don't believe any conversation was had with Mr. James at the fish pond about it.

Q. You just took him out to where he could see the fish pond and came away, is that correct?

A. I do not wish to say no more conversation than that was held. Mr. Williams was there and many newspaper men and I do not wish to say that no conversation was held with him, but I do not remember any of the words that he said or that was said to him.

Q. Do you remember the substance of anything that was said to him there? (R. 670).

* * * * * * *

Q. Was he informed at any time on the way up, where he was being taken?

A. He was told that before we started from this building.

Q. Well, when you told him that, did you tell him why you were taking him up there?

A. No.

Q. And did you tell him why he was there while he was on the premises?

A. No, sir.

Q. And did you tell him why he had been taken there when he was on his way back?

A. I don't remember that.

Q. Did anyone—when I say "you", I mean it in the plural sense.

A. Not that I remember (R. 671).

Q. Now, Mr. Killion, you remained with the defendant after he was taken to the District Attorney's office, during all the time until he went out to eat?

A. On my second trip, you are still talking about?

Q. Yes.

A. Well, I remained in one or the other of the two rooms. I wasn't with him every minute of those hours I spent there, but the greater portion of the time I was with him.

Q. At any rate, you accompanied him up to the room where he was in the District Attorney's office?

A. Yes sir, I did.

Q. And after getting there you remained there with him for some considerable period of time before you went out?

A. That is true.

Q. And during that interval of time, before you left that room, there were other people in the room also?

A. Yes, sir.

Q. And they were not just sitting there saying nothing?

A. No, sir.

Q. They were talking to Mr. James, weren't they?

A. Yes, sir.

Q. Now, you go ahead and tell us everything that was said to Mr. James up to the time that you first left the room? (R. 673).

A. Well, I will be unable to say which person said a certain thing, but, of course, I can remember about what was said in substance by some one of us.

Q. All right; just go ahead and tell us what your recollection is.

A. Well, he had been told that Mr. Hope had told the story of Mr. James' wife's death, and he was asked if he didn't want to tell his side of the story.

. . . . . .

Q. Who asked him, if you remember?

A. I suspect all of us did at different times during this conversation.

Q. When he was asked to tell his side of the story the first time, what did he say?

A. I think he said that "That guy", referring to Hope (R. 674), "is a damn liar and if you are going for that business", or words to that effect, "you will have to do it." As I recall, that was his reply.

Q. Did anyone reply to that?

A. Well, I can't remember as to that particular question. I mean I don't remember whether anyone replied to that particular thing or not.

Q. Well then—of course, it is impossible for you to give the conversation in sequence, just as it occurred, but just go on and tell us what else you can remember that was said to him in that conversation.

A. Well, it was a *long conversation.* (Italics ours.) (R. 675.) It was broken at intervals by some silence.

Q. Just a moment When you say it was broken at intervals by some silence, do you mean that there were some times when Mr. James just quit answering questions?

A. No, I don't mean that at all. I mean, as you have intimated, *that there was questioning for several hours* (italics ours), (R. 675) and during those several hours there were many times when nothing was said by James or by the other people who were present.

Q. All right. Now, let's have any of the other things that were said to him, if you remember.

A. Well, he was asked questions as to things about his wife's death. As I remember it, he might have been asked "Well, what did you do with the snakes? Where did you get the snakes and where did you go on a certain occasion?" and matters of that sort.

Q. Now, he denied getting any snakes, didn't he?

A. Yes, he did.

Q. And when he denied getting the snakes, some question after such denial, would be asked him as to what he did with the snakes.

Q. His questioners kept on assuming that he got the snakes, during that entire time, didn't they?

A. Well, I don't know what the other questioners did.

Q. You heard them, didn't you?

A. Yes, but I don't know what they assumed.

Q. During that period was he asked anything about his wife's body being in the fish pond?

A. Yes, sir.

Q. What was he asked about that?

A. I can't tell you, in words.

Q. Well, give me the substance, as nearly as you can.

A. He was asked when the body was put in the fish pond and by whom.

Q. He told you he didn't know, didn't he?

A. Well, in substance, yes.

Q. He wasn't there?

A. That is what he said (R. 676).

Q. And when he said that did anyone tell him that he was a liar?

A. No, sir.

Q. Did anyone tell him that they had the goods on him?

A. No, sir.

Q. Then what were some of the other things that were asked him?

A. Well, if this is a satisfactory answer, *about everything that is in Hope's story was asked him.* (R. 676), (Italics ours).

Q. And he denied every bit of it, didn't he?

A. No, I wouldn't say every bit.

Q. What do you remember that he didn't deny first?

A. Well, he admitted that he knew Hope and that Hope had been up there and he said that Hope was a medical student and that Hope had used his automobile on different occasions. Those were some of the things that I remember that he didn't deny.

Q. But he did deny having discussed killing his wife with Hope, didn't he?

A. Yes, he did.

Q. He denied being in any way concerned with his wife's death, didn't he?

A. Yes, he did.

Q. He denied being in any way concerned with his wife's death, didn't he?

A. Yes.

Q. He denied all knowledge of her being dead until her body was found in the fish pond, didn't he?

A. Well, I don't know that that was asked him. In substance, I suppose he did.

Q. He denied having any wish to see his wife's death, didn't he?

A. I suppose in thought, at least, he did. I don't know that that was asked him.

Q. He stated that he loved his wife, didn't he?

A. I don't think he did on that occasion, no.

Q. Well, now, the answer that you gave a moment ago, when he was asked nearly everything concerning the matter, covers the whole conversation up to about the time that he went out to dinner?

A. As I remember it, it does.

Q. What was said to him just before he said that he would make a statement?

A. He called to me. At that particular time there was no one in the room except Mr. Gray, Mr. Hope and myself.

Q. Mr. Hope do you mean?

A. Mr. James, Mr. Gray and myself. The three of us were the only people in the room. Mr. James said, "Say, *can't we go out and get something to eat* (R. 677, italics ours) and I will tell you the story?"

Q. Now, it had been prearranged that you and Mr. Gray would be left alone in that room with Mr. James, hadn't it?

A. No, I am sure it had not.

Q. If it had, you had no knowledge of it?

A. That is right. • • •

Q. You and Mr. Gray had been out of the room for some interval of time, and both came back just before he said this?

A. No, that isn't true. We had been in the room for some time, but the other persons who had been in the room with us had departed.

Q. How long would you say you and Mr. Gray and Mr. James were in the room there alone before he said this?

A. I would say five or ten minutes.

Mr. Clark: I hope your Honor will indulge me this one purpose:

Q. Will you tell me once more, and just as nearly as you can remember in the words used by Mr. James, what it was that he said in regard to making a statement? I don't want to suggest or intimate anything in my question. I want it to come from you as nearly as you can reproduce the words.

A. In substance—I can't remember the words, but in substance he said, "Can't we go out and get something to eat?"

Q. Is that all?

A. Just a moment.

Q. Pardon me. I didn't mean to interrupt you.

A. Or to the effect that, "If you fellows—" and I got it from that that he meant Mr. Gray and me— "—will take

me out to eat now," he said, "I will tell you the story" (R. 678).

It will thus be seen from the testimony of Killion that James at first denied the story of Hope and kept denying that he had killed his wife until midnight when he asked the officers "will you take me out to eat now? I will tell you the story" (R. 678).

James said that around six o'clock the officers were served with sandwiches and coffee, but that he received none (R. 506). He said he had himself sent someone out to buy a couple of sandwiches for him, but somebody ate them before the sandwiches got to him. Officers told James that the deputy ate them (R. 506). Deputy District Attorney Robert Stewart testified that he did not see the sandwiches as he went out about that time and got one himself because he had been left out of the sandwiches (R. 591). No other officer testified to James having eaten any sandwiches. It was not until after James was taken out for a beefsteak on the promise that he would tell "the story" that the informal confession was given to Killion which was followed by the more formal one to District Attorney Fitts, both of which were used in evidence to bring about the conviction of the appellant.

The record thus overwhelmingly supports the statements that James was beaten, threatened, frightened, questioned until he fainted, and only confessed because of fear of a recurrence of such beatings, and further establishes the fact that he was deprived of sleep and food and of his right of counsel.

With reference to the matter of his counsel, we point to the fact that the interrogation commenced on a Saturday, shortly before noon, a time when attorneys generally leave the city for the weekend. The District Attorney knew where Mr. Silverman was located,—that is, that he was at Murrieta Hot Springs, a matter of about two and a half

hours ordinary traveling time from Los Angeles. There was therefore no reason why, if the District Attorney was in good faith in the matter of having the defendant represented, he could not wait until James' counsel could be present. But James did not stop with asking for Mr. Silverman,—he asked for Mr. Parsons (R. 625). Mr. Parsons was not communicated with (R. 626). The record further discloses that when James was first arrested he asked Southard at the time when he was first taken to the District Attorney's office, right after his arrest, to get in touch with Silverman (R. 466). It does not appear however that anyone attempted to get in touch with him, and no explanation was given as to why this was not done.

Respondent's brief says that Silverman talked to James on Monday (R. 571), but this apparently is erroneous, the record not being clear and Silverman reprimanded by the court for attempting to explain his effort to see his client (R. 483). James was taken there early Sunday morning, and was then taken to the house next door where he was continuously plied with questions in relays of four hours each, and on Monday Deputy District Attorney Williams visited him at the private house where he was being unlawfully detained. It also appears from Silverman's own testimony that he did not see James until Tuesday, April 21st (the prosecutor's questions would so indicate, R. 482), when James was arraigned in court, and then only during the arraignment and not for consultation purposes, and that Silverman did not have an opportunity to consult with James until April 25th. Officer Southard was confused as to times and dates. He says he did not think he booked James until April 22nd (Wednesday) (R. 467), whereas from all the other testimony it appears that he was booked on April 21st.

Thus we see that every statement of fact upon which respondent bases his claim that there was "no force, vio-

lence, threats, coercion, or any unlawful means employed" (R. 31) is belied by the record. Thus the "chronological order of events" which respondent sets up leaves much to be added and corrected by reference to the testimony itself, as shown by the record.

While it is admitted that James was not taken before a magistrate for a period of at least 48 hours after his arrest, and contrary to the laws of the State of California, which laws are a safeguard to the defendant to enable him to get counsel promptly, and while it is further conceded that Los Angeles had night courts at the time of this case which were open on Sundays and until at least one o'clock in the morning, and that James was not arraigned before any magistrate that day nor the next, and not until the day following, and then not on the charge for which he is here on trial until seventeen days thereafter, it is respondent's contention that even though Southard struck him, due process of law was not violated because the alleged confession was not made for eleven days thereafter. But respondent forgets that once having created a state of fright in the mind of the defendant it is presumed that this fright continues until it be affirmatively established by the prosecution that influences under which the defendant was first held had ceased to operate upon his mind.

In several cases where a confession was obtained from the defendant under threats or coercion and a subsequent confession was obtained without threats or coercion it has been held that the controlling influence which produced the prior confession is presumed to continue until its cessation is affirmatively shown, and evidence to overcome or rebut this presumption must be very clear, strong and satisfactory. If there is any doubt on this point the confession must be excluded. In the case of *People* v. *Johnson*, 41 Cal. 452, at 455, the Court said:

"The law presumes the subsequent confession to have

been made and influenced by the same hopes and fears as the first, and this presumption continues until it be affirmatively established by the prosecution that the influence under which the original confession was made had ceased to operate before the subsequent confession was made. (*State* v. *Roberts*, 1 Dev. 259; *Peter* v. *State*, 4 Sm. & Marsh, 3; *State* v. *Gould*, 5 Halstead 163; *Deathridge* v. *State*, 1 Sneed 75; 2 Russ. on Cr. 834; 1 Wharton Am. Cr. Law, Sec. 694.)

In the instant case no first confession was obtained which emphasizes the fact that the defendant had no intention of confessing. This is re-emphasized by the fact that immediately after Williams first saw him on May 2nd he refused to add to Hope's story and denied that story to the officers and others who had taken him to the scene of the fish pond. It was only after he was refused food and was intensively questioned until midnight that the alleged confession commenced to "crack."

3. Error as to Deprivation of Right of Counsel.

Respondent says, "The record does not bear out petitioner's assertions that he was held incommunicado for two days and nights in a private home without being taken before the nearest and most accessible magistrate and without being allowed counsel of his choice." (Resp. Br. 39.)

The record discloses that petitioner was arrested Sunday morning about 9 a. m. (R. 559), that he was then taken to the house next door (R. 560), then taken to the district attorney's office (R. 560), and then taken back to the torture house next door where the questioning started in relays. Being arrested without a warrant Section 849 of the Penal Code of California required that he be taken before the nearest and most accessible magistrate. Los Angeles at the time of this case had day and night courts open Sunday with a magistrate presiding (R. 458). He was not taken be-

fore the magistrate and no complaint was filed (R. 570). The defendant asked to see Mr. Silverman when he first went to the District Attorney's office (R. 466), (R. 487). He gave Mr. Fitts Mr. Silverman's telephone number (R. 487). Mr. Silverman saw him first in court on April 21, 1936 during arraignment period when a large number of men are brought down from the jail and returned after arraignment, and no opportunity is afforded for consultation. He consulted James first on April 25, 1936 (R. 483). Petitioner was then kept in the "High power" tank (R. 597).

On Saturday May 2, 1936, shortly before noon, the district attorney, and investigating officers, then being on notice that James had counsel of his choice (R. 621), entered the county jail, removed James from his cell to the chaplain's room, sat him down opposite a stenographer, and across from Southard, the man who had struck him, brought Hope in handcuffed, and there accused him with a purported statement of Hope's. Silverman, his counsel, was not there, nor had he been notified.

Shortly thereafter the prosecuting officer secured a court order for the removal of James from the jail without notification to defendant's counsel, Mr. Silverman (R. 623)

The petitioner was thereafter taken to the scene where his wife died, but without the presence of his attorney, Mr. Silverman, and without friends (R. 624).

Thereafter he was taken to the District Attorney's office, where he requested that Mr. Silverman be contacted. He was told that Mr. Silverman was at Murrieta Hot Springs, about two and a half hours traveling time from Los Angeles. The investigation, and interrogation was not delayed to await Mr. Silverman (R. 625).

The petitioner asked for another attorney, Mr. Parsons, but Mr. Parsons was not communicated with (R. 626). The interrogation continued right on without counsel and without waiting for counsel.

4. Errors Regarding Facts Relating to Rattlesnakes.

Respondent says that Autopsy Physician Wagner "when he again examined the deceased's body following its disinterment he was of the opinion that the laceration on the deceased's toe was caused by a rattlesnake bite" (Resp. Br. 35). This is erroneous.

When Dr. Wagner was asked whether he had reached any conclusion as to what caused the incision on the toe of the deceased, he replied, "Not a definite one, no sir" (R. 98).

Pressed further, he admitted he had never been bitten by a rattlesnake nor had he *ever* seen anyone bitten, and that the laceration could have been made by a rattlesnake or *anything else* that would have a similar instrument for making such a puncture laceration" (R. 99. Also R. 999.) (See full discussion in R. 999 by Justice Seawell.)

Dr. Gustave Boehme, according to respondent's brief (Resp. Br. 35) gave similar evidence.

Dr. Boehme limited his testimony to *probabilities* only and said that the laceration could have been caused by laceration, it could have been caused by snake bite, it could have been caused by some other method. "So far as the wound itself was concerned, it could have been caused by a number of different things (R. 110; also full discussion in R. 1000).

Respondent has failed to point out how the "identical snakes tended to corroborate the testimony of the prosecution witness."

Why wouldn't any other two snakes do the same thing?

Besides, it was not claimed there were two snakes in the box that Hope claimed the foot of Mrs. James was placed, but only one. Hence, why two "identical" snakes? Hope says he bought three snakes from Mr. Kirby (R. 62, 131) and took them to his own apartment and kept them for a couple of days (R. 63) and delivered them to James, and that appellant expressed himself as dissatisfied. He now

speaks of putting the "two snakes" in a box (R. 66). What happened to the third?

5. Errors Regarding Colorado Evidence.

Respondent concedes that California law does not require notice of the use of such evidence as was produced in this case from the State of Colorado (Resp. Br. 36). He states that such evidence did not come without notice to petitioner because while he was under arrest he was questioned about it! (Resp. Br. 36).

He further says that the request for continuance was denied "for insufficient showing therefore, as required by the law of California, namely, the filing of affidavits in support of such motion for continuance, setting forth facts warranting the trial court in granting such application."

We do not understand the trial court to so hold the insufficient showing. The trial court permitted, in lieu of affidavits, the taking of testimony. James then took the stand and testified and the letter received from the proposed witness was testified to.

But the insufficient showing, as we construe it, was in not being able to set forth in affidavit or testimony, what the witness would testify to—a fact that could only be secured in the State of Colorado where the witness was located (R. 687-690).

Respondent's brief also says: "Where one is charged with murder it is within the discretion of the trial court to permit the introduction of evidence tending to establish a prior murder where the proof of such prior murder tends to throw light upon a particular fact, or explain the conduct of a particular person, which fact or conduct has a bearing upon some issue in the case for which the defendant is on trial (Resp. Br. 37).

We do not so understand the law to be: *Peo.* v. *Hartman*, 62 Cal. 562; *Peo.* v. *Lenon*, 79 Cal. 625; *Peo.* v. *Bishop*, 81

Cal. 113; *Peo.* v. *Stewart*, 85 Cal. 174; *Peo.* v. *Hurley*, 126 Cal. 351; *Peo.* v. *Koller*, 142 Cal. 621; *Peo.* v. *Jones*, 31 Cal. 565; *Peo.* v. *Lane*, 100 Cal. 379; *Peo.* v. *Martin*, 50 Cal. Ap. 71; *Peo.* v. *Gilliland*, 103 Pac. (2) 179; 101 C. A. D. 687.

Respondent says: "Where it is claimed by the accused that the act in question was innocently or accidentally done, or done by mistake, or where the evidence is susceptible to such an inference, proof of such other act" is admissible, etc. But in this case it was not claimed that the defense was that the defendant did anything innocently or accidentally or by mistake that caused the death of Mrs. James. No such issue was here involved.

6. Hope's Affidavits That He Committed Perjury and the Conviction Rested on Perjured Testimony.

It is conceded by the Respondent that it was the duty of the Supreme Court of California to consider the Hope affidavits, if not on rehearing, then by *Habeas Corpus* (Resp. Br. 38). Hope's affidavits that he committed perjury at the trial, that the snake stories were "all the bunk," that he testified under threats, and that the prosecuting officers knew his testimony was perjured, were filed on his petition for rehearing pursuant to possible authority vested in the California courts under Article VI Sec. 4¾ of the Constitution of California and Sec. 956a Code of Civil Procedure of the State of California and Rules 38 of the Supreme Court of California to take additional evidence and make different findings "in the interests of justice" while the case is pending on appeal. The petition for rehearing containing the affidavits and petition to take additional evidence was served on the adverse party, but there was no counteraffidavit or answer filed.

Because the import and meaning of these California constitutional and statutory proceedings have never been ap-

plied or construed by the California courts in a situation such as this case, where trial by jury has been had, appellant filed at the time said petition for rehearing was still pending and undetermined, a petition for a writ of *habeas corpus* pursuant to authority set forth in the case of *Mooney* v. *Holohan* decided by this court.

Respondent concedes that the California court therefore considered these affidavits, but resolved against them because of the evidence produced at the trial "which was entirely in conflict with the Hope affidavits."

On motion for new trial an affidavit was filed by R. E. Parsons, one of the attorneys in the case, that Scott Littleton, investigator in the case, who sat at the district attorney's table throughout the trial, had written a magazine article in which he said regarding getting Hope's statements:

"On the way we tried to get over to him the idea that the more he talked the better his chances would be of escaping the rope. * * *

"At three o'clock the following morning we had dug out of Chuck Hope, ex-sailor and floor finisher, a story that Poe might have imagined" (R. 826).

7. Hope's Fantasy. The Rattlesnake Myth.

Hope had told James he spent all his life "fooling with dope" (R. 769). That he was an inordinate drinker was testified to by his own admissions and other people who saw him drunk.

No one besides Hope ever saw any snakes on the James premises. Mrs. Eva Murphy of Alabama, who was visiting her brother, the petitioner, when Hope said he left snakes there, did not see any (R. 761).

The physical facts of the case belie Hope's fantastic story. Hope said Mrs. James had on a nightgown (R. 75). When

her body was found the Pembertons said she had on pajamas, and bedroom slippers (R. 10).

Hope says Mrs. James was made drunk, yet there was no alcohol in her bloodstream (R. 103), *nor was there any poison in her system*, according to Dr. Wagner, the autopsy surgeon.

The effect of rattlesnake poison on the system was shown in experimentation upon guinea pigs by Dr. Boehme (R. 115; R. 1001), resulting in a large amount of blood in the lungs and contraction of the heart, none of which conditions existed in Mrs. James whose heart and lungs were normal (See discussion by Justice Seawell, R. 1001).

Mrs. James had a single laceration of her left toe. A snake punctures, like a hypodermic, and does not lacerate or tear.

There was but a single laceration; a snake has two fangs in the upper part of its mouth.

Snake bites suppurate; there was none around this laceration.

To have been able to strike the foot in the position described by Hope the snake would have had to have been upside down and strike upwards.

Hope's story has many other inconsistencies. He said he took the snakes to his own apartment and kept them there a few days before delivering them to James (R. 63) and that he had no conversation with James when he delivered them (R. 63). He got paid for them before he delivered them (R. 64).

Hope says he bought two inches of tape for James and James taped her eyes and mouth with only two inches of tape. Yet Dr. Wagner says there were no marks of any tape being removed from the eyes or mouth (R. 108).

Hope says Mrs. James was tied down with rope. Yet Dr. Wagner says that a body, which bruises only before

death showed no bruise marks and such would be indicated where rope might have tied her.

Hope says that Mrs. James was dead by at least 4 a. m., August 5, 1935, yet they waited to carry her out until daylight 7 a. m. of that day.

Dr. Wagner says he performed the autopsy 3 p. m., August 6, 1935 (R. 99-100). The body had been dead from 12 to 24 hours (R. 101).

8. Other Facts Proving Defendant's Innocence.

The context of Mrs. James' note to her sister was such as could only have been written by a woman, and it states that it was "old blue Monday" as she was writing. According to Hope's story she was then dead (August 5, 1935, was Monday).

One of the insurance policies on Mrs. James was not delivered until that day, and there is no showing that James knew it was to be delivered, and if insurance was the motive, as contended by the respondent, James would have waited until he got the policy (R. 1039).

The uncontradicted testimony of the witness Dr. Alfred Dinsley, that he saw a woman, who could have been none other than Mrs. James, in her chicken yard hours after Hope said she was dead, wearing the colored garment described by the other witnesses. This testimony is corroborated by the fact that several persons were within the James dooryard at about nine o'clock in the morning and nobody saw her body on the cement walk (R. 1084).

Hope advised James to take Mrs. James to a hospital. "That the person whom they were attempting to kill should be taken by them to a hospital to be restored to health is too absurd to require comment."

The above is amply corroborative of Hope's affidavits that his story was "all the bunk" and was perjured, and that the judgment founded thereon should be set aside.

ARGUMENT.

Respondent, as we view it, has misconceived the scope and meaning of this court's decisions with reference to the use of third-degreed confessions.

This court, as we view it, has proscribed the use of this kind of evidence in any case in America as a protection to democracy, and has decreed that its use is violative of the Fourteenth Amendment to the Constitution of the United States.

It has held that dictatorships might use it to torture its victims and inflict punishments, but that in a free democracy its use must be abhorred and prohibited, not only by the highest court in the land, but by every other court that must follow its decisions.

The case at bar is like that of *Ziang Sung Wan* v. *U. S.*, 266 U. S. 1, cited by us and detailed by respondent in that this petitioner was on the eleventh day after his arrest taken to the scene of the alleged crime, shown the premises and various objects connected therewith, with several newspapermen and investigators present (no doubt to create a psychological fright) and thereafter questioned from 3 p. m. until 3 a. m. the following morning. The officers were too much in a hurry and too busy to buy anything to eat on the way out (R. 670).

Wan had been taken on the eighth day after his arrest to the scene of the crime, shown the various objects and premises connected with it and questioned from 7 p. m. until 5 a. m.

The case of *Bram* v. *U. S.*, 168 U. S. 532, 42 L. Ed. 568, is very much in point. In that case the defendant was told that another member of the crew had accused him, Bram, of the murder, and that if he had an accomplice he should tell it. Bram, denying that he had committed the murder,

blamed another. He was then under arrest. The confession was excluded. This case contains an analysis of many others, and we shall refer to this case more in detail later.

The Accusatory Statement.

In California, as pointed out in respondent's brief, silence to an accusatory statement, even where the person is under arrest and has been advised by counsel not to talk, can be used against the accused as an implied admission of guilt. It forms the necessary corroboration required by law (Sec. 1111 Penal Code of California) to support the statements of an accomplice, whose testimony is insufficient unless corroborated.

We have challenged the use of such proceedings as violative of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

It constituted securing an implied confession by threats and intimidation. The proceeding here outlined enables the prosecutor to do indirectly, what he could not do directly. It enables him to accuse the defendant in custody and under the protection of the law, and even under advice of counsel not to speak, and to use his, the prosecutor's hearsay statement of the accusation made by a co-defendant, and the failure of the accused to reply, as an implied admission of guilt. We cannot believe that this is due process, or a fair trial in the American way.

Bram v. *U. S.*, 168 U. S. 532.
Powell v. *Alabama*, 287 U. S. 45, 52.
Peo. v. *Pfanschmidt*, 262 Ill. 411.
Peo. v. *Conrow*, 200 N. Y. 356, 93 N. E. 943.

In *Cody* v. *U. S.*, 25 Fed. (2) 299, the court said:

"but after the arrest and during an official examination, while respondent is in custody, it is common

> knowledge that he has a right to say nothing. Only under peculiar circumstances can there seem to be any duty then to speak. Lacking such circumstances, to draw a derogatory inference from mere silence is to compel respondent to testify."

This is but an attempt to "trap him into fatal contradictions" condemned in *Brown* v. *Walker*, 161 U. S. 596.

Look at the situation. James is taken from his "High power" tank to a private room. No counselor or friend was present. Several officers came in. Officer Southard who struck him is there. Hope is handcuffed to the officer. A stenographer is present. The prosecuting officer, with all the authority of the law, enters with others. He is accused in the presence of all of them. He is asked, if he has anything to "add" to the story. He answers nothing, and that is taken as an implied admission of guilt sufficient to corroborate Hope's fantastic story.

Could anything be more violative of his constitutional rights?

In *United States* v. *Wrenn*, XXI Canadian Criminal Cases 119, 121 (Available Library of Congress), the court, in rejecting the testimony between a detective and a prisoner in the county jail, said:

> "The practice of detectives interviewing a prisoner when in jail and no one else is present at the interview should be discouraged. * * * the jailer should not permit private interviews between a crown detective and a prisoner.
>
> "The detective in this instance, being alone with the prisoner, first tells him there is a 'pretty strong' case against him and then presses him with questions."

The court condemned this practice as leading to untrustworthy results and injustice to the prisoner.

In *Boyd* v. *United States*, 116 U. S. 616 (29; 746) attention was called to the intimate relation existing between the pro-

vision of the 5th Amendment securing one accused against being compelled to testify against himself, and those of the 4th Amendment, protecting against unreasonable searches and seizures; and it was in that case demonstrated that both of these amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change. In commencing on the same subject, in *Brown* v. *Walker*, 161 U. S. 596 (40; 821), the court, speaking through Mr. Justice Brown, said:

"The maxim *Nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquistorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be

founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly imbedded in English as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."

There can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was imbedded in that system as one of its great and distinguishing attributes.

In *Burrowes* v. *High Commission Court* (1616), Bulst. 49, Lord Coke makes reference to two decisions of the courts of common law as early as the reign of Queen Elizabeth, wherein it was decided that the right of a party not to be violated by the ecclesiastical courts. Whatever, after that date, may have been the departure in practice from this principle of the common law (Taylor, Ev. Sec. 886), certain it is that, without a statute so commanding, in *Felton's Case* (1628), 3 How. St. Tr. 371, the judges unanimously resolved, on the question being submitted to them by the King, that "no such punishment as torture by the rack was known or allowed by our law."

In *Purpura* v. *United States*, 262 F. 473, 475, the court said: "It is well settled that, to render a confession admissible, it must clearly appear that it was free and voluntary, and that the witness was not influenced by threats, violence, or by any implied or direct promises—in other

words, it should clearly appear that the confession was not due to any improper influence by those seeking to obtain the same". When one is arraigned on a criminal charge, the law presumes that he is innocent until the contrary is shown by evidence sufficient to convince the jury beyond a reasonable doubt as to his guilt. Therefore it is highly important in a case like the one at bar that this right should be preserved, and that only confessions should be admitted where it clearly appears that it was the free act of the defendant, without any inducement, threat or other influence.

In 2 Hawkins, Pleas of the Crown (8th Ed.) p. 595, Sec. 34, there is an admirable statement of the law upon this subject, which is as follows:

> "And as the human mind under the pressure of calamity is easily seduced, and liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail, a confession, whether made upon an official examination, or in discourse with private persons, which is obtained from a defendant either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction."

The following from 3 Russell on Crimes (6th Ed.) 478, we think is a clear statement of the record:

> "But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. * * * A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the

prisoner, and therefore excludes the declaration if any degree of influence has been exerted."

The case of *Bram* v. *United States*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, is very much in point—indeed, we think it is practically on all fours with the case at bar. There it appears that the defendant, who was the first officer of the ship of which the deceased was the captain, was charged with the murder of the captain on the high seas. The alleged confession was supposed to have been made to a detective at a time when the defendant was under arrest. The detective testified that no threats were made or any inducements held out to him. On this point the witness was interrogated by the court, and testified as follows:

"Q. You say there was no inducement to him in the way of promise or expectation of advantage? A. Not any, your honor.

"Q. Held out? A. Not any, your honor.

"Q. Nor anything said, in the way of suggestion to him that he might suffer if he did not—that it might be worse for him? A. No, sir; not any.

"Q. So far as you were concerned, it was entirely voluntary? A. Voluntary, indeed.

"Q. No influence on your part exerted to persuade him one way or the other? A. None whatever, sir; none whatever."

Thereafter the witness on cross-examination answered the following question, "What did you say to him, and he to you?" to which the witness answered as follows:

"When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me; where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said: 'Now, look here, Bram; I am

satisfied that you killed the captain from all I have heard from Mr. Brown. But, 'I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies.

"Q. Anything further said by either of you? A. No; there was nothing further said on that occasion."

In that case the Supreme Court said:

"'The law cannot measure the force of the influence used or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.' In the case before us we find that an influence was exerted, and as any doubt as to whether the confession was voluntary must be determined in favor of the accused, we cannot escape the conclusion that error was committed by the trial court in admitting the confession under the circumstances disclosed by the record."

In the case of *Sorenson et al.*, v. *United States*, 143 Fed. 820-824, 74 C. C. A. 468, 472, the court said:

"The confessions in the case before this court were made to an inspector while the defendants were prisoners under his control. He stated to one of them that he had an absolutely good case against him, and to both that the thing for them to do was to plead guilty and to throw themselves on the mercy of the court, and the matter would probably be overlooked in the state court. Tried by the decision of the Supreme Court in *Bram's* case, either of these statements was 'legally sufficient to engender in the mind of the accused hope or fear in respect of the crime charged,' and each of them rendered the subsequent confession involuntary and inadmissible in evidence."

In this instance, as we have stated, the testimony shows that defendant for a period of almost 24 hours, excluding the time he was asleep, was continuously plied with questions by these five inspectors and all manner of questions propounded to him about the circumstances under which the package in question was lost. It further appears that he was given no rest during this period, except when asleep; that he endeavored to communicate with friends for the purpose of employing counsel, and that he spent the night at the hotel under protest.

Under the circumstances, according to the testimony of the inspectors, we think this alleged confession is clearly inadmissible. This is true, independent of the testimony of the defendant; but in many respects, as we have said, the defendant's testimony is corroborated by that of the inspectors. In view of what we have said, the court below was in error in admitting this alleged confession, and therefore the judgment of the lower court should be reversed.

In *People* v. *Loper*, 159 Cal. 6, 112 Pac. 720, Ann. Cas. 1912B, 1193, where the length of examination does not appear, the court in holding the admission of a confession erroneous, said, *interalia:* "After his arrest, the defendant was submitted to a rigid examination by the sheriff, the district attorney, and others. On the following morning he made a confession, which his counsel contend was due not to his own voluntary impulse, but resulted from this close examination, characterized by them as 'a relentless sweating process.' * * * He was entitled to stand mute, if he chose to do so, and to have no confession save a voluntary statement—one not extorted by fear nor induced by promises—introduced against him at his trial. Of this right he was deprived. Without instruction as to the law applicable to his case, without advice of counsel, without knowing that his utterances might be used against him, he was cajoled, browbeaten, and persuaded; was called

'a monumental liar;' was told that Vernet's friends would have hanged him 'to the first tree' if the sheriff had taken him to the place where the dead body was found; and, in short, every sort of device was employed to force a confession from him. Then, to enable these persuasions to sink deeply into his mind, he was solitarily confined for the night. To say that the confession of the following morning was not influenced by the conduct and the conversation of the officers would be to contradict all human experience."

In *State* v. *Borello*, 161 Cal. 367, 37 L.R.A. (N.S.) 434, 119 Pac. 500, it was held that an alleged confession secured from one suspected of crime, by a protracted searching examination of public officials, who assumed a menacing and browbeating attitude, accompanied by threats, invective, false statements, and profanity, is not admissible in evidence against him. In this case the interview in question, at which were present the district attorney, the sheriff, the deputy sheriff, official stenographer, and a constable, lasted at least two hours and a half, although some of the parties testified that it lasted nearly five hours. The court said: "That a confession so extorted cannot be admitted in evidence is firmly established in the jurisprudence of this country."

In *People* v. *Quan Gim Gow*, 23 Cal. App. 507, 138 Pac. 918, where the length of the examination does not appear, the court held it to be erroneous to admit testimony of an alleged confession where, on the day of the arrest, the defendant was taken to the detective's office at the police station, and, in the presence of several officers, interrogated as to the killing of decedent. The court said, *inter alia:* "While no physical force was used and neither threats nor promises made, there can be no doubt at all but that the repeated questioning of the officers, like the constant dropping of water upon a rock, finally wore

through his mental resolution to remain silent. Admittedly, his refusal at first to answer incriminating questions gave evidence of a desire to make no statement. When did this unwillingness vanish and a desire to talk succeed it? Not after he had been given any period of time for reflection, for his inquisitors allowed him none. The examination was persisted in until a response was forthcoming, and under these circumstances it must be said that the responses appear to have been unwillingly made, and as a direct result of continued importuning."

In *People* v. *Clark*, 55 Cal. App. 42, 203 Pac. 781, where it was held that alleged admissions and confessions were improperly admitted, because not voluntary, the court said: "The showing made by appellant in support of her objection to the admission of this evidence was that, for a period of more than two weeks, the appellant was subjected to almost daily cross-examination by from two to four police officers, who, by 'mental suggestion composed of cajolery, flattery, assurances of good will and friendship, interspersed with brutal browbeating, accusations, indirect threats, and misrepresentation of facts,' and without advising her of her constitutional rights, or permitting her to have the benefit of counsel, were able to dominate and control the mind of appellant when she was in a state of physical and mental helplessness." The court pointed out that it was conceded that no specific promises of reward were made, but there were frequent assurances of the police matron to the effect that it was the best thing for the prisoner to tell the truth, and said further: "It is apparent from the testimony of the witnesses for the state that the relentless sweating process to which the appellant was subjected was such as to render her statements involuntary. She was put through a course of cross-examination continuing over a period of two weeks, when she was in such a low physical and mental condition that

she had to be assisted by matrons into the examination room, with her head covered with wet towels to keep her in a condition to answer the questions. These examinations lasted for hours at a time, during which time appellant was denied food or other nourishment."

Discussion of the Denial of Due Process on the Grounds of the Method of Obtaining the Informal and Formal Confession.

It is very evident that the District Attorney was bent on getting a confession in this case by any means whatsoever. It is equally clear that he intentionally and systematically used unlawful means to do so. The investigation started March 22nd, 1936, several months after the death of Mrs. James and after an insurance company agent had told James that if he sued for the recovery of the policy they would see he was hanged (R. 739). He did sue and on March 31st, 1936, Robert Herron, a shorthand reporter of the District Attorney's office was in Federal Court to take down James' testimony in the trial of that proceeding (R. 784). No fact or circumstance had at that time come to light which in any way indicated that James had killed Mrs. James. The circumstances regarding the finding of the body of Mrs. James drowned in the fish pond, her delicate condition of health, partly due to her pregnancy and the fact that she suffered from insomnia, were all known to the investigators.

It was for the purpose of trying to get something on James that a dictophone was installed in the house next door, which house was rented by the District Attorney's office and which later became James' private jail. Nothing incriminating came over the dictophone with reference to the murder charge, but on April 19th, 1936, it was deemed the psychological time to take James into custody and start working on him.

It is obvious that the accusation of incest against James at the time they were "working on him" to get a confession of murder was but another step in the threats and coercion which was being used upon James.

As a part of the plan of brow-beating and threatening this appellant into a confession of murder he was charged with the grave crime of incest with his niece. No facts regarding this incest charge appear in this record other than that James evidently denied the charge, stood trial, was convicted, and the case was under appeal; that he was fighting this accusation which was very evidently used to force him to confess to the murder charge. It would appear ridiculous to charge James with incest if the evidence was sufficient to warrant trying him for the murder where his life was at stake. The accusation and the whole procedure was apparently but another step in the plot by the District Attorney to coerce and extort a confession of some kind from James.

There is nothing in this record whatsoever to justify the statement that James was caught in bed with his niece, and it is entirely immaterial in the case here except that it shows the respondent's unfair effort to prejudice even this Court.

Respondent's position in the face of the above record with reference to the third degree confession is that James was not beaten, threatened, coerced, frightened, questioned until he fainted, and confessed because of a fear of a recurrence of such beatings, but they contend, in effect, that if his confession was obtained by being beaten, threatened, frightened, questioned until he fainted, and because of fear of a recurrence of such beatings, then it should not be considered because it could not be sufficient to be violative of due process of law, because, they say, it was not the sole or principal part of the evidence upon which the conviction rests.

This argument rests upon a misconception of the due process clause of the 14th Amendment as construed by this

Court. *Chambers* v. *Florida*, 309 U. S. 227; 84 L. Ed. 716. The prosecution having used the confession to obtain the conviction in this case cannot now say that it had no influence or effect upon the jury in bringing about the conviction. The contention is an admission that due process was violated. In this respect the respondent's case rests in fallacy. Their whole brief was built up with the idea of attempting to show that this defendant was guilty of the crime charged. Every possible prejudicial influence was brought to bear even in this Court. But as stated by Mr. Justice Roberts in *Snyder* v. *Massachusetts*, due process of law is not concerned with the guilt or innocence of the person charged. See also *Moore* v. *Dempsey*, 261 U. S. 88; 67 L. Ed. 543. Procedural due process of law has been violated if the accused has been denied a fair trial in an American way—if from his lips has been wrung by tortuous methods a statement or confession which is introduced in evidence against him, and which necessarily weighed heavily with the jury in determining his life or his liberty. The people thereafter cannot say that it should be ignored because there was other evidence from which an inference of guilt might be taken. Having taken so much pains and effort to get the confession and thereafter get it introduced in evidence the people must have regarded it as highly important in bringing about a conviction in the case.

But regardless of the confession or its contents, regardless of what the evidence might show, if procedural due process has been violated this Court has held that the accused is entitled to a reversal of the judgment.

In *Snyder* v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674, Mr. Justice Roberts said:

> "A distinction has always been observed in the meaning of due process as affecting property rights, and as applying to procedure in the courts. In the former aspect the requirement is satisfied if no actual injury is

> inflicted and the substantial rights of the citizen are not infringed; the result rather than the means of reaching it is the important consideration. But where the conduct of a trial is involved, the guaranty of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way. Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules, and is not satisfied, if, though the hearing was unfair, the result is just."

In order to bolster up their position respondent then quotes in full the informal confession given to Officer Killion after Killion had bought him a meal, and the formal confession given to the District Attorney, Buron Fitts, at about one-thirty in the morning thereafter.

These confessions are concerned largely with rattlesnakes about which James stated that the officers having him in charge had repeated to him in various forms "a thousand times" until he knew the story by heart that they wanted him to tell.

But the officers were so concerned and interested in the rattlesnakes that they forgot that Mary Emma James died of *drowning*, and the only reference to drowning in James' confession is that Hope told him he, Hope, had thrown Mrs. James in the fish pond. But under well-known rules of law this does not establish the *corpus delicti* of murder by drowning in this case, and the people have failed entirely to establish the crime of murder by drowning of Mary Emma James. Nowhere in either the direct or circumstantial evidence is there any proof that James or his accomplice Hope actually drowned Mary Emma James. This was pointed out in the opening brief, but there was no answer to the factual situation pointed out in appellant's brief that Mrs. James was drowned.

It therefore appears that the conviction of James rests "solely or principally" upon his confession or the alleged confession of his accomplice Hope.

There is a further admission by the respondent that they did not file any charge of murder against the appellant until after they secured the Hope confession which formed the basis of the prosecution, together with James' alleged confession.

It thus appears that the conviction rested upon the confession of James and the alleged confession of Hope, with no other proof anywhere of the corpus delicti in this case.

It further appears that the confession was used as the major portion of the case to bring about James' conviction.

But the respondent says that these issues were presented to the jury. This statement presents the same fallacy as contained in the argument made by counsel in *Chambers* v. *Florida*, 309 U. S. 227, 84 L. Ed. 716; *White* v. *Texas*, 310 U. S. 530, 84 L. Ed. 1342, and *Canty* v. *Alabama*, 309 U. S. 629, 84 L. Ed. 988.

This Court has determined that it will examine for itself the record to see if procedural due process of law has been violated, and upon such determination will upon its own determination reverse the judgment.

An instruction embodied in the case giving the jurors the entire facts regarding the third degree as they appeared from the evidence during the trial was refused by the trial Court in this case. But regardless of what the jury might have determined this Court will determine first and foremost whether under the Constitution of the United States procedural due process of law has been violated and will examine the record for itself. Upon such an examination it is quite apparent that in this case there has been such a violation of procedural due process and that it is necessary to reverse the judgment for that reason.

Further Discussion of the Accusatory Statement.

There was another violation of procedural due process when the defendant was taken out of his "High Power Tank" in the jail and to the Chaplain's quarters on May 2nd, 1936, and there was confronted by Deputy District Attorney Williams, who told him what Hope had allegedly said to him, Williams, and asked James if he had anything to add to the statement.

At that time James had already been warned by his attorney, Mr. Silverman, not to talk to anyone unless he was present. James had repeatedly denied all accusations against him. It was but a few hours later that Officer Killion, accompanied by James, went out to the fish pond where his wife had died and James thereafter taken to the District Attorney's office was again interrogated by officers and members of the District Attorney's staff. James again denied Hope's statement and said it sounded "screwy" to him. It was quite apparent that the accusatory statement made to him by Williams was not free and voluntary and that he was in no position to speak and the use of this accusatory statement against him constituted a violation of procedural due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

Chambers v. *Florida*, 309 U. S. 227;
Peo. v. *Conrow*, 200 N. Y. 356, 93 N. E. 943;
Peo. v. *Pfanschmidt*, 262 Ill. 411.

The District Attorney and his deputies and his officers were all on notice that the defendant was represented by counsel. They were aware of the legal ethics which required a counsel to notify opposing counsel and to deal with opposing counsel and not the client. James was under no duty to speak to the officers or anyone else, and to use this accusatory statement against him violated his constitutional rights under the 14th Amendment.

In *People* v. *Graney*, 48 Cal. App. 773, 775, cited by re-

spondent, it was specifically brought out that the fact that Graney had been advised by his counsel not to talk was not before the trial Court; nor is there a parallel situation in *People* v. *Wilson*, 61 Cal. App. 611, cited by respondent. But even if state cases were to hold that a man is under duty to answer to an accusatory statement after he has conferred with his attorney, and in the absence of his attorney, where he has been instructed not to talk in the absence of his attorney, such procedure we respectfully submit violates due process of law. Because if, as expressed in *Powell* v. *Alabama*, a man is entitled to the right of counsel at all stages of his proceedings, he is entitled to rely on the advice of his counsel and to have the advice and presence of his counsel when proceedings are to be taken which may be used against him. And the fact that he follows that advice is no indication that he is admitting an accusation against him.

Moreover, the procedure herein had violated James' rights against being threatened because if he was required to reply or speak under pain that failure to do so would be used against him, it would be in effect the means of causing him to incriminate himself while threatened even though he followed the advice of his counsel and did not "add anything." This should be a violation of due process of law under the 14th Amendment to the Constitution of the United States, to protect persons and property in this democracy against self-incrimination, under threats, torture and pressure.

But the respondent says that the story told by petitioner was not the same story as that told by Hope, and is subject to suspicion as to its truthfulness. Hope's stories are entirely fantastic. They are the creations of a literary mind—perhaps that of Scott Littleton, who wrote for Liberty Magazine and painted the lurid story of this case in a special article in that weekly publication. Undoubtedly the officers

who told James what to say could not remember all the lurid details they were trying to paint. It did not make any difference to them whether they got James to say Hope killed Mrs. James, or whether Hope said he did it. In either case James would be liable under the laws of California. So any story they might get him to tell which would incriminate himself was all they wanted. It's a similar situation to that in *Bram* v *U. S.* 168 U. S. 532, L. Ed. 568.

But the physicial facts in the case belie the fantastic confessions. The experiments conducted by Dr. Boehme on the guinea pigs showed that the poison of the rattlesnake quickly caused the heart and liver to become black and to shrink. Mrs. James, who, if the rattlesnake story is to be believed, had been bitten some twenty-hours longer before her body was found, had no evidence of any poison in her body whatsoever. Her heart, lungs and liver were all normal. There was no discoloration of these vital organs. Hope testified that Mrs. James was made drunk. But liquor is known to be a counter-action to rattlesnake poison. So if James or Hope had been going to poison her by the means of rattlesnake poison they would not have given her liquor. That her vital organs showed no evidence that they had been affected by the venom of rattlesnakes, as that venom customarily affects human beings and as it affected the guinea pigs upon which the doctor experimented and reported to the court, is a fact to be considered in this case.

Mrs. James had but a single laceration. A rattlesnake fang actually punctures. It suppurates around the puncture after it enters. Besides, a rattlesnake has two fangs, and the laceration on the left toe was but a single mark. The statement in respondent's brief that the coroner's physician stated that he was of the opinion that she had been bitten by a rattlesnake is unsupported in the record. There were no marks of violence upon Mrs. James and no evidence that she was drowned in the bathtub. Just how this could have

occurred or did occur is not explained anywhere in the long record, nor in respondent's brief. When her body was found at the fish pond her lungs were full of water. She still had some clothes on. The letter which was obviously in her handwriting, written to her sister on "old blue Monday," told of her having been bitten by some insect, and it spoke lovingly of her husband. Dr. Alfred Dinsley, a neighbor, saw a woman of Mrs. James' appearance walking around in the yard of her home after Hope claimed she was dead (R. 609). Hope said Mrs. James' mouth was taped and that she was made drunk. Yet there was no evidence of alcohol in her blood nor any tape marks when Dr. Wagner examined her.

In *King* v. *State*, 155 Ga. 707, 118 S. E. 368, the court, in holding a confession made to a fire inspector inadmissible, referred to the principle that no man is required to incriminate himself, and quoted from the Georgia statutes in part as follows:

> "To make a confession admissible, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury."

The court pointed out that no confession came until the State officer told the defendant to come on and make a clean breast of it because, as a rule, courts were light on those who did not give them much trouble, and stated that "voluntary is practically synonymous with spontaneously, of his own free will,—and not when overmastered by the will of another," referred to "the picture of this young defendant, taken by an officer, whose duties are statewide, to the room which the defendant, who lived in Tifton, knew was the room of the judge of the superior court, and, surrounded by the court stenographer and an attesting officer, as well as another person, none of whom perhaps he expected to meet when he accepted the invitation of the State fire inspector

to talk the matter over with him, where, after being grilled for three hours, and being subjected to such a nervous strain that he broke down and cried, and at length, after he was told that he was telling a different story from that told by his wife, and frightened by the statement that he needn't lie, because they had ample evidence to convict him, after being charged with guilt of a crime more heinous than arson—the crime of perjury—after having been sworn before his own examination, with no friend or counsel to advise him of his right and privilege to refuse to swear, he makes the confession which was admitted by the court."

In *People* v. *Vinci*, 295 Ill. 419, 129 N. E. 495, a homicide case, the court reversed a judgment on the ground that a confession was not freely and voluntarily given, and that it was error to receive it in evidence under these circumstances: "Plaintiff in error was questioned during the greater part of three days and four nights by the state's attorney, two of his assistants, his private secretary, and several police officers. While we do not believe any physical force was used, nor that direct threats or promises were made, there can be no doubt at all that the repeated questioning by these officers, like the constant dropping of water upon a rock, finally wore through Vinci's mental resolution of silence. Admittedly his refusal at first to answer incriminating questions gave evidence of a desire to make no statement. The examination was persisted in by turns until plaintiff in error finally yielded to the importunities of his questioners and gave answers which they sought. It seems clear to us that the accused became convinced that he was bound to make a statement to secure relief from the continuous questioning of those having him in charge, and under the circumstances we do not see how a confession thus obtained can be said to be voluntary." The court was of the opinion that the object was not to secure a confession as evidence against the defendant, but to secure

a statement for the purpose of making the defendant a witness for the prosecution of the crime.

In *People* v. *Sweeney*, 304 Ill. 502, 136 N. E. 687, the court, in holding that statements of the defendants were erroneously admitted in evidence, said:

> "There was no denial of the charge that these men, from the time of their arrest until the time that the statements were made, were continuously subjected by the state's attorneys and the officers having them in custody to prolonged questioning at unusual and unreasonable hours; that they were not allowed to sleep, that they were not given necessary food, and that they were beaten."

In *State* v. *Albert*, 50 La. Ann. 481, 23 So. 609, the court reversed a conviction of two defendants on account of the admission against them of confessions made after prolonged questioning, and after one of the defendants had been taken to the place of the supposed crime. The court said:

> "Their arrest, and being heavily handcuffed and incarcerated in separate cells of the jails, where they were repeatedly interrogated and plied by their keepers with numerous questions, separate and apart from each other, with direct reference to the charges preferred against them, coupled with the injunction that it were better for them that they should tell the truth, is clearly indicative of an undue influence having been brought to bear upon them, for the purpose of eliciting proofs of their guilt."

In *Flagg* v. *People*, 40 Mich. 706, 3 Am. Crim. Rep. 70, the court, in reversing a conviction on account of the erroneous admission in evidence of a confession, said:

> "When a party under arrest is told by the officer that the best thing he can do is to own up,—that he had better make a statement,—when it is supposed

> that a statement can be forced—'knocked'—out of him because 'he was a weak one;' when intoxicating liquors are furnished him to aid in the forcing process; and when, on the following morning, he is taken in irons to the office of an attorney, and there, in the presence of those hostile to him, with bolted doors, is interrogated, his answers reduced to writing and sworn to, it is idle to say that such a confession was free and voluntarily made, even although the witnesses may testify that no inducements were made or held out to him."

The court further characterizes the offense committed in the efforts to extort a confession as a "perversion of the process of the law,—'a poisoning of the fountains of justice.'"

In *People* v. *Wolcott*, 51 Mich. 612, 17 N.W. 78, the court, in holding the admission of a confession erroneous, said: "In the middle of the night, after the officer who had arrested him had retired for much-needed rest, the respondent, instead of being allowed the like privilege of rest, was visited by three persons in succession, whose mission appears to have been to obtain confessions by impressing upon the mind of the respondent that it would be better for him, or he would get off easier, if he made confession. None of these persons was the officer in charge; but their admission to the cell at such an unreasonable hour carried with it an implication of the officer's consent to their mission, and respondent could scarcely fail to be impressed that their assurances were made with full authority. No reliance can be placed upon admissions of guilt so obtained, for the very obvious reason that they are not made because they are true, but because, whether true or false, the accused is led to believe that it is for his interest to make them."

In *People* v. *Prestidge*, 183 Mich. 80, 148 N. W. 347, where the court held that a confession was erroneously

admitted which was made after a severe sweating or grilling for upwards of two hours by the sheriff, the undersheriff, and the prosecuting attorney, it was said: "The respondent states that during the time of the examination he was very nervous and nearly crazy. It is not incredible that he should have been in that condition at the end of two or three hours of grilling such as he received. It is needless to argue that a statement made under such pressure is voluntary, whether it is true or false."

In *People* v. *Brockett*, 195 Mich. 169, 161 N. W. 991, the court held the admission of a confession of a defendant, nineteen years old, erroneous. He was arrested on Tuesday night, and kept for two days in a cell with a cement floor and no bed; during this time he was taken into the office of the chief of police for a number of interviews, and on Thursday he made a confession in the presence of the assistant prosecuting attorney, the chief of police, and detectives. The court said, *inter alia:*

> "Proof of a confession is never admissible unless it is voluntarily made, and by the word 'voluntary' is meant that the confession must be of the free will and accord of the defendant, without coercion, whether from fear of any threat of harm, promise or inducement by hope of reward, or method known as 'sweating'. In our opinion the means used, by the uncontradicted evidence in the instant case, must have so agitated the mind of the defendant as to arouse his fear, and to have a coercive effect. Therefore the confession was not voluntary."

In *People* v. *McCullough*, 81 Mich. 25, 45 N. W. 515, it was held that it was error to admit in evidence a letter written by a police captain under the prisoner's dictation, where the police took the prisoner into a room and vigorously examined and cross-examined him, his counsel being in an outer office and not permitted to see him until the

letter and another statement were secured. The court stated that confessions must be "voluntary and without any influence being exerted by the officer, either of threats, promise, artifice, or duress."

In *Robertson* v. *State*, 81 Tex. Crim. Rep. 378, 6 A. L. R. 853, 195 S. W. 602, where the district attorney verbally abused and threatened the defendant and obtained his confession after about an hour's interview, it was held that the confession was not voluntary, as a voluntary confession ought to be voluntarily given, and not forced or extorted in any

• • • • • • •

In *People* v. *Rogers*, 303 Ill. 578, 136 N. E. 470, where the court affirmed a conviction where confessions had been excluded, it quoted from a newspaper reporting the statements of a police official, and the court, in a comment on the matter of securing confessions, said, *inter alia:*

> "It is the most dangerous and the most uncivilized practice imaginable to allow the police to go out and arrest a man or a boy upon mere suspicion that he has committed a crime, and for days subject him to the sweating process and to violence until he finally gives up and confesses in order to escape the torture to which he is being subjected."

In *State* v. *Thomas*, 250 Mo. 189, 157 S. W. 330, the Court said:

> "Officers, in trying to secure confessions or admissions from a party suspected of crime, should not forget that they have no legal right to compel a person under arrest to make any statement whatever,—that no one can be compelled to furnish evidence against himself; and where the interrogatories are persisted in to an unreasonable extent, thereby producing mental anguish on the part of accused, the confession or admission thus obtained should be wholly rejected as

> involuntary, the same as if it had been obtained by the infliction of physical torture. * * * We are aware that it is generally held that the constitutional guaranties against being compelled to testify against one's self do not apply to facts elicited by an officer through interrogatories propounded to a prisoner out of court, but we are convinced that the distinction is often more apparent than real. Both the Federal and state Constitutions are always liberally construed so as to prevent compulsory self-crimination."

In *Bianchi* v. *State*, 169 Wis. 75, 171 N. W. 639, it was held to be error to admit statements of the defendants, who had been taken to the office of the district attorney and had been sworn and examined by him and their testimony reduced to writing, the court observing:

> "In our criminal jurisprudence there is no room for such procedure."

The court considered that the defendants were ignorant of the illegality of the proceeding, and the district attorney failed to advise them of their constitutional right. In *Davis* v. *U. S.*, 32 F. (2d) 860 a confession obtained from an Indian was held inadmissible because he was taken to the morgue beforehand.

These cases have now been given meaning and force under the Fourteenth Amendment to the Constitution of the United States in:

Chambers v. *Florida*, 309 U. S. 227; 84 L. Ed. 988;
Brown v. *Mississippi*, 297 U. S. 278;
Canty v. *Alabama*, 209 U. S. 629;
White v. *Texas*, 310 U. S. 530; 84 L. Ed. 1342.

We respectfully submit the same authorities require reversal of the judgment of the case at bar.

The Rattlesnake Evidence.

Respondent says with reference to the bringing of the rattlesnakes into the courtroom that it was done in a quiet and orderly manner. Then, respondent says, they were kept there only for the length of time necessary for their identification as exhibits in the case and for inspection by the jury, and as soon as practical they were quietly removed from the courtroom. This very statement is an admission by the respondent that the rattlesnakes necessarily had an inflammatory effect and that it was necessary to remove them as soon as inspected in the courtroom. Respondent says the snakes were left only long enough to permit the jury to observe them for their evidentiary value. Respondent says that it was permissible to bring the snakes in if the ends of justice could be furthered by their production. But wherein were the ends of justice furthered by the production of the snakes? Respondent has failed to point out in anywise how the production of the snakes could aid the jury in the determination of the issue.

What did the snakes prove that could not be proved without them? If snakes are produced solely for the purpose of agitating the jury's feelings, they cannot be used for any purpose whatsoever.

Respondent cites what he calls an analogous case (R. 144). He says that if someone had attempted to kill a person with a hammer and had failed and had shot the person in the head with a revolver, would it be contended that the hammer found by the side of the victim could not be produced? What the respondent has offered is not the hammer (or snake) beside the victim but the case containing the carpenter's tools, nowhere near the victim. Respondent forgets that it is not the whole rattlesnake which it is claimed went into the foot of the deceased, but the fang. If respondent had produced only the fang and showed that it entered

into the wound, then perhaps, coupled with satisfactory expert testimony, there might have been some evidentiary value to it. But to produce the rattlesnake in a glass-encased box nowhere near the victim and not used to frighten her into drowning could have had no other purpose than to inflame the passions and prejudices of the jury and to prove nothing in the case. Whether a person is bitten by a snake or otherwise is only subject to expert testimony of medical men and where the subject matter is peculiarly within the knowledge of experts a jury must be guided by expert opinion. The snakes therefore could in no way aid. And the only thing about the snakes which were exhibited that could have affected the jury in any way was the rattling, frightening and horrifying nature of the snakes, and that was to horrify the jury.

Respondent relies on the trial judge's determination that no prejudice resulted to the defendant from the bringing into the courtroom of the rattlesnakes. But if the trial judge was to determine this case then there would be no need for appeal. This court has frequently said that it will determine for itself whether the constitutional rights under the Constitution of the United States have been violated. This is the same argument that has been made with reference to the jury's determination regarding third degree methods and other constitutional questions which have been before this Court.

As pointed out in the dissenting opinion of the late Justice Seawell, there are some things of which the Court can take judicial knowledge and the bringing in of rattlesnakes and its effect on the ordinary mind is one of those things.

The very argument made by the respondent, respondent says there is absolutely no evidence to the effect that any person either on the jury or off the jury was in the slightest degree agitated either by the presence of the snakes or the manner of bringing them into the courtroom.

The evidence in this record shows that W. J. Clark, one of the attorneys in the case, made an affidavit describing the wave of terror that prevailed in the courtroom. But Mr. Clark did not rely alone on his own observations of the wave of terror that swept the courtroom. He quoted from two of the large daily newspapers in general circulation in the city of Los Angeles. These observations were made by paid observers whose profession and business it is to record their observations in judicial proceedings for the general public.

The Herald Express described the scene as follows:

> "Buzzing their hollow rattles so loudly that women in the crowded courtroom shivered and shuddered at the eerie, frightening sound, as two diamond-backed rattlesnakes, glittering in their new skins today were placed on the counsel table in Superior Charles W. Fricke's court, where Robert S. James, the Birmingham barber, crouched ghost-faced and jittery at his trial for the murder of his golden-haired wife Mary."

The Examiner described the scene as follows:

> "A diamond-backed rattlesnake hissed and struck before the trial jury as the long glass box was borne forward like a hideous offering of a black ritual."

The newspapers had also interviewed the jurors after the case was concluded, as to how they happened to reach their verdict, and here is what the jurors said:

Harold W. Hart, one of the jurors, said:

> "James had been convicted in my own mind ever since they brought the rattlesnakes into the courtroom, showed them to us, and then introduced witnesses who told us that James had actually stuck his wife's foot into a box containing one of those serpents and had watched it strike her."

Mrs. Ollie Sype said:

> "The sight of the rattlesnakes which were exhibited as the weapons by which Robert James did his wife to death stunned me. It was the most shocking experience of my life."

There was no attempt on the hearing of the motion for a new trial to strike out these affidavits, nor was there any denial in the affidavit of Eugene D. Williams of statements made by the jurors. Williams' affidavit admits that there was a commotion, but gives his version of the commotion.

Respondent claims that the rattlesnakes were relevant to the issues and admissible as part of the *res gestae*, but he does not point out wherein they were necessary to establish the cause of death by drowning nor to establish the *res gestae* in this case. Nor does he point out why any two rattlesnakes would not have served the same purpose; nor in fact why any hundred rattlesnakes would not have subserved the same objective. Any other two rattlesnakes that the people might have produced would have had the same shocking effect upon the jurors.

In *Commonwealth* v. *Carl*, 87 Pa. Sup. Ct. exhibited a dog, alleged to be dangerous, and vicious, was held properly excluded, in a trial for harboring a nuisance.

See the following cases, *Dozier* v. *State*, 82 Tex. Cr. Rep. 321, 199 S. W. 287; *Lucas* v. *State*, 50 Tex. Cr. Rep. 219, 95 S. W. 1055; *Grace* v. *State*, 88 Tex. Cr. Rep. 301, 225 S. W. 751; *State* v. *Gaffy*, 30 S. D. 548, 210 N. W. 980; *Louisville & N. R. Co.* v. *Pearson*, 97 Ala. 211, 12 So. 176; *Perry* v. *Metro. St. Ry. Co.*, 68 App. Div. 351, 74 N. Y. S. 1; *Newman* v. *State*, 85 Tex. Cr. Rep. 556, 213 S. W. 651. See also, *Sutherland* v. *State*, 24 Ala. App. 573, 139 So. 110.

The Colorado Evidence.

Examination of the evidence produced regarding the death of James' former wife in Colorado reveals that it would be insufficient taken as a whole to establish any crime in Colorado. We have set it up in full in the record in this case because it forms such a large portion of the present trial other than to prejudice him. *Peo.* v. *Glass*, 158 Cal. 650. The respondent says that the taking of the life of Winona James occurred as a result of a scheme executed partly in California and partly in Colorado. The record does not bear out respondent's statement that any part of the alleged scheme was executed in California. And respondent does not point out any such evidence. It is true that Winona James was finally buried in California and that James filed his claims for insurance after he arrived in California, but all events leading up to her death were outside of the State of California. This is the first time that this novel doctrine has been advanced in this case by the respondent. Nothing that happened in the case would bring them within the doctrine entitling a person to be tried within the vicinage where a crime is alleged to have occurred. At common law where a crime occurs partly in one county and partly in another, it could be tried in neither county (*People* v. *Powell*, 87 Cal. 348). While this doctrine has been modified to the extent of permitting a trial it must nevertheless take place in the county where the death occurred (*People* v. *Powell*, 87 Cal. 348).

The statement made that the process of the court was available to petitioner (p. 173, Respondent's Brief).

Respondent relies on the fact that James was questioned prior to his indictment about the death of Winona James. This is certainly no notice to him that he is going to be tried in the California courts for it. They also rely on the fact

that at the commencement of the trial the opening statement of the people indicated that testimony of this kind would be offered. The record here does not disclose the opening statement, and it did not appear in the original record filed with the Supreme Court of the State of California. But the opening statement of the prosecutor has never in and of itself been regarded as notice of the charge of which an accused must be informed to meet. It is the indictment where bills of particulars are permitted as they are in the Federal courts. Bills of particulars have been permitted to supplement, at least to some extent, the charge in the indictment so that an accused may have sufficient notice at the time of trial to be prepared to meet the charges. California proceedings do not provide for any bills of particulars, and under such circumstances there is no notice to the accused.

The processes of the courts of California, contrary to the statement of the respondent, were not available to the appellant. Depositions are not confrontation, and an effort to convict by means of deposition have been held to be in violation of due process of law.

In *Dowdell* v. *U. S.*, 221 U. S. 326, 329, 55 L. Ed. 757, the court said:

> "This is substantially the provision of the 6th Amendment of the Constitution of the United States, which provides that the accused shall enjoy the right to a speedy and public trial, and to be confronted with the witnesses against him. This provision of the statute intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused *upon deposition* or *ex parte* affidavits, and particularly to preserve the right of the accused

to test the recollection of the witnesses in the exercise of the right of cross-examination. Mattox *v.* United States, 156 U. S. 237, 242, 39 L. Ed. 409, 410, 15 Sup. Ct. Rep. 337; Kirby *v.* United States, 174 U. S. 47, 55, 43 L. Ed. 690, 693, 19 Sup. Ct. Rep. 574, 11 Am. Crim. Rep. 330; 2 Wigmore, Ev. sec. 1396, 1397." (Italics added.)

Proof on one alleged murder is never to be established by an alleged murder in another ~~case~~ state, in any case unrelated to the case on trial, ~~and has never heretofore been permitted in any case as a similar offense~~.

Respondent seriously contends that even though it may be that the due process of law clause of the Federal Constitution was violated by the prosecutor when he introduced a mass of evidence to prove that the appellant had committed another murder in another vicinage and State, years before, a charge of which he had no notice, no opportunity to prepare to defend and no process through which he could produce witnesses,—that even then, the conviction will be upheld unless it "affirmatively appear" that the error was so gross as "to amount to no trial at all."

None of the cases cited to uphold this proposition are in point.

Three of them involve the taking of property allegedly without due process of law. These are *Arrowsmith* v. *Harmoning*, 118 U. S. 194, 30 L. Ed. 243; *American R. Ex. Co.* v. *Kentucky*, 273 U. S. 269, 71 L. Ed. 639; *Roberts* v. *New York*, 295 U. S. 264, 79 L. Ed. 1429.

It is only necessary to refer to *Snyder* v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674, to distinguish these authorities, wherein it is said that a different rule applies to the issue presented where it is claimed that property has been taken in violation of the 14th Amendment than where in criminal cases life or liberty has been taken in violation of that amendment through the procedural process employed, and

that in the latter case it is enough that it appears that the constitutional safeguard has been violated,—the judgment will be reversed.

Respondent's other two authorities were criminal cases but in neither was it held that any constitutional right was violated at all.

In each of these cases it was held that the action of which complaint was made was, if the complaint were justified, merely an erroneous ruling on a matter which did not violate any constitutional right.

These cases are *Re Converse,* 137 U. S. 624, 34 L. Ed. 796, and *Howard* v. *Kentucky,* 200 U. S. 164, 50 L. Ed. 421.

In the *Converse* case the trial court ruled that the word "agent" in a statute, included "attorney". In the *Howard* case the defendant expressly waived his right to be present while one juror was being selected. The juror was excused by the court. Hence no claimed constitutional right was violated.

No language used in any one of these decisions in the slightest degree supports respondent's proposition for which they are cited.

In *Peo.* v. *Powell,* 87 Cal. 348, the court said:

"Mr. Cooley, in his work on Constitutional Limitations, in discussing the effect of such a constitutional provision as ours, says:

> "Accusations of criminal conduct are tried at the common law, by jury; and wherever the right to this trial is guaranteed by the Constitution, without qualification and restriction, it must be understood as retained in all those cases which were triable by jury at common law, and with all the common law incidents to a jury trial, so far, at least, as they can be regarded as tending to the protection of the accused. * * * Many of the incidents of a common-law trial by jury are essential elements of the right. The jury must be

indifferent between the prisoner and the Commonwealth; and to secure impartiality challenges are allowed, not only for cause, but also peremptory, without assigning cause. The jury must also be summoned from the vicinage where the crime is supposed to have been committed; and the accused will thus have the benefit, on his trial, of his own good character and standing with his neighbors, if these he has preserved; and also of such knowledge as the jury may possess of the witness who may give evidence against him. He will also be able, with more certainty, to secure the attendance of his own witnesses." Cooley, Const. Lim. 5th ed. 390-393.

This same doctrine, and the reasons for upholding it, are more fully stated by the same learned author and judge in the case of *Swart* v. *Kimball*, 43 Mich. 448, in which it is said:

"The Constitution of the State provides that 'the right of trial by jury shall remain, but shall be deemed to be waived in all civil cases, unless demanded by one of the parties in such manner as shall be prescribed by law.' Article 6, Sec. 27. The right to remain. What right? Plainly the right as it existed before—the right to a trial by jury as it had become known to the previous jurisprudence of the State. Underwood *v.* People, 32 Mich. 1. The right is not described here; it is not said what shall be its incidents; it is mentioned as something well known and understood, under a particular name; and by implication, at least, even a waiver of its advantages is forbidden. If the accused himself cannot waive them, plainly the Legislature cannot take them away. The next section of the Constitution repeats the guaranty of this method of trial 'in every criminal prosecution,' and nothing is better settled on the authorities than that the Legislature cannot take away a single one of its substantial and beneficial incidents (Opinions of Justices, 41 N. H. 550; Ward *v.* People, 30 Mich. 116); and even the accused cannot waive any one of the essentials. Work *v.* State, 2 Ohio

St., 296; Cancemi *v.* People, 18 N. Y. 128; Hill *v.* People, 16 Mich. 351; Allen *v.* State, 54 Ind. 461. Now that in jury trial it is implied that the trial shall by a jury of the vicinage is familiar law. Blackstone says that the jurors must be 'of the *visne* or neighborhood, which is interpreted to be of the county where the fact is committed.' 4 Com. 350. This is an old rule of the common law (2 Hawk, P. C., chap. 40; 2 Hale, P. C. 264); and the rule was so strict and imperative that if an offense was committed partly in one county and partly in another, the offender was not punishable at all (2 Hawk, P. C. chap. 25; 1 Chitty, Cr. L. 177). This overnicety was long since dispensed with, but the old rule has in the main been preserved in its integrity to this day. It is true that Parliament, as the supreme power of the realm, made some exceptions, which are enumerated by Mr. Chitty in his treatise on Criminal Law (vol. 1, p. 179), the chief of these being cases of supposed treason or misprision of treason examined before the privy council, and which under the Statute of Hen. VIII. might be tried in any county, and offenses of the like character committed out of the realm, and which by a statute of the same arbitrary reign were authorized to be tried in any county in England. But it is well known that the existence of such statutes with the threat to enforce them was one of the grievances which led to the separation of the American colonies from the British empire. If they were forbidden by the unwritten constitution of England, they are certainly unauthorized by the written Constitutions of the American States, in which the utmost pains have been taken to preserve all the securities of individual liberty. It has been doubted in some States whether it was competent even to permit a change of venue on the application of the State, to escape local passion, prejudice and interest (Kirk *v.* State, 1 Coldw. 344; Osborn *v.* State, 24 Ark. 629; Wheeler *v.* State, 24 Wis. 52); but this may be pressing the principle too far (State *v.* Robinson, 14 Minn. 447 (Gil. 333); Gut *v.* Minnesota, 76 U. S. 9 Wall. 35, 19 L. Ed. 573); but no one doubts that the right to a trial by a jury of the vicinage is as complete and cer-

tain as it ever was, and that in America it is indefeasible (1 Bishop, Cr. L. (2d ed.) Sec. 552; Wharton, Cr. L. Sec. 277; Paul *v.* Detroit, 32 Mich. 108; Ward *v.* People, 30 Mich. 116)."

The use of Colorado evidence has deprived this appellant of trial in the vicinage and

The use of the Colorado evidence has thus further deprived appellant of notice and opportunity to be heard, as required by due process of law.

Powell v. *Alabama*, 287 U. S. 45;
Mooney v. *Holohan*, 294 U. S. 102, 79 L. Ed. 794;
Holden v. *Hardy*, 169 U. S. 366.

The Right of Counsel.

We have discussed this question in our opening brief, and under other headings herein but wish to call the attention of this Court to the immigration case of *Ex parte* Chin Loy You, 223 Fed. 833, where the person asked for counsel and was refused he was denied all the incidents of a fair proceeding.

The Hope Repudiation.

Hope's repudiation was before the court of California. It is before this Court. It is supported by ample facts and circumstances warranting the reversal of the judgment. The suggestion of respondent that appellant, if he has anything further, present another writ, reminds us of the California case of *Peo.* v. *Smith* from this very trial court. Smith was hanged admittedly by mistake while waiting for his appeal to be decided. So here, unless the judgment was reversed, petitioner would be hanged while waiting for new matters.

But the affidavits of Hope are uncontradicted, and entitle petitioner to the reversal prayed for.

The Equal Protection of the Laws.

Respondent mistakes the meaning of this provision of the Fourteenth Amendment. It was designed to protect any person—not any class of persons. Besides, respondent's case would seem to mean that he contends that district attorney's officers and deputy sheriffs and police are individuals. But they are state agents, and their action is the action of the state. *Mooney* v. *Holohan*, 79 L. Ed. 794. And if they deny to any individual the protection and blessings of equal treatment that individual has been denied the equal protection of the laws. State action of any kind, which is unequal, is voided.

Conclusion.

What we have said in this closing brief has been unusually long, because of the length of respondent's brief.

Respondent has had an unfair trial. He has been convicted in an un-American way. He was unfairly taken to a house next door by police officers instead of jail and struck by such officer. He was held incommunicado for two days and nights and continuously questioned without sleep or food. He was lodged in the High-power tank of the jail. He was thereafter without notice to his counsel removed from the cell and taken to a private room and there, without friends or counsel, in the presence of Hope, handcuffed to an officer, accused of the crime of murder and asked if he had anything to add to it, and in violation of his right of self-incrimination, his silence was used against him as an admission of guilt; he was taken to the scene of the death of his wife, then back to the district attorney's office and questioned incessantly until he asked for food and then told "the story." This was used in evidence against him. Two live hissing rattlesnakes were brought into the courtroom to inflame the passions and prejudices of the jury.

Evidence regarding the death of a former wife in Colorado were produced by the state, without notice, without opportunity to meet it, without the right or confrontation of the witnesses guaranteed by the statutes of California, and without the processes of the court to bring them to California.

Much other prejudicial matter was introduced in the case.

Hope's testimony, repudiated by him, was refused favorable consideration by the court.

And the petitioner was denied the right of counsel when he requested the same, and when it would have been of most benefit to him.

Such procedure, we respectfully submit, violates procedural due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

It resulted in a trial that was a mock and sham. It blended rattlesnake venom with a pretended verdict.

In America, it is the law that if a defendant cannot be convicted fairly he should not be convicted at all and where there has been an unfair, un-American trial the judgment must be reversed.

Chambers v. *Florida*, 309 U. S. 227; 84 L. Ed. 716;
Moore v. *Dempsey*, 261 U. S. 88; 67 L. Ed. 543;
Powell v. *Alabama*, 287 U. S. 45; 77 L. Ed. 158;
Brown v. *Mississippi*, 297 U. S. 278; 80 L. Ed. 672;
Mooney v. *Holohan*, 294 U. S. 102; 79 L. Ed. 794.

Respectfully submitted,

Morris Lavine.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. [illegible]

MAJOR RAYMOND LISENBA,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On writ of certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1940

No. 133

MAJOR RAYMOND LISENBA,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On writ of certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF

STATEMENT

Petitioner was tried and convicted in the superior court of the State of California, in and for the County of Los Angeles, of the crime of murder. He moved for a new trial which was denied and thereupon judgment of death was imposed upon him for the commission of said crime. An appeal was taken to the Supreme Court of the State of California from the order denying petitioner's motion for a new trial and from the judgment. On

March 21, 1939, the judgment and order denying a new trial were affirmed by said Supreme Court, and a rehearing was granted by said court on April 20, 1939. (89 Pac. (2d) 39.) On October 5, 1939, the said judgment and order were again affirmed by said court and on November 3, 1939, a rehearing was denied. (94 Pac. (2d) 569, 14 Cal. (2d) 403.) On October 31, 1939, petitioner filed with said Supreme Court an application for writ of habeas corpus which was denied without prejudice on November 9, 1939. (98 Cal. Dec. Minutes of Nov. 9, 1939.) On November 6, 1939, an appeal was allowed by said Supreme Court to the Supreme Court of the United States from the judgment made and entered on the fifth day of October, 1939, and on the eighteenth day of January, 1940, an appeal was allowed by said Supreme Court to the Supreme Court of the United States from the order made and entered on the ninth day of November, 1939, denying petitioner's application for a writ of habeas corpus. On October 28, 1940, this Honorable Court dismissed said appeals for want of jurisdiction but, treating the papers whereon the appeals were allowed as petitions for writ of certiorari, granted certiorari.

POINTS RELIED UPON BY PETITIONER

The points relied upon herein by petitioner, in the order set forth in his brief, are as follows:

I. That third degree brutal methods were used upon him to coerce and extort a purported con-

fession and the use of such means and methods rendered the entire trial void under the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States;

II. That two live rattlesnakes were brought into the courtroom and exhibited to the jury, which snakes had no evidentiary value, and the use of demonstrative evidence which only serves to inflame the passions and prejudices of the jury violates the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States;

III. That the introduction of evidence of the circumstances surrounding the death in the State of Colorado of a former wife without such crime being charged in the indictment and without notice being first given to him of such charge contravened his rights under the Fourteenth Amendment of the Constitution of the United States;

IV. That the testimony of the witness Charles H. Hope was false and known to the prosecution to be false, and therefore the trial was a mere pretense and was in violation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States;

V. That he was deprived of the right of counsel after his arrest and at the time he was interrogated, and therefore the use of his statements constitute a

violation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States:

VI. That he was denied the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF CASE

Robert James, petitioner, was convicted of the crime of murder of his wife, Mary James. Petitioner's true name is Major Raymond Lisenba. The word "Major" is not a title, but a given name. This name he discarded a number of years ago and has since been known as Robert James. (R. 484.) He was a barber by trade with his place of business in Los Angeles, California. (R. 713.) His wife, Mary James, was found dead at the fish pond in the rear of petitioner's residence in La Canada, California. La Canada is a small town near the City of Los Angeles. She was lying face down with her head and a portion of her shoulders in the water; the right arm folded underneath her and the left arm lying at her side. (R. 21, 23.) The water in the fish pond at the place where the body was lying was approximately fourteen inches deep. (R. 52.) The deceased was found in this position in the early evening of August 5, 1935. No prosecution was commenced for the crime of murder until May 6, 1936 (R. 815.) because proof of the criminal agency producing the death of Mary

James was not discovered until after Hope was arrested and questioned on May 1, 1936. (R. 469, 630, 631.)

AT THE TRIAL THE FOLLOWING FACTS WERE ESTABLISHED:

Early in 1935, James met E. L. Taggart, an automobile salesman, and stated that he desired to buy a cheap car with the understanding that he could turn it in on a large Studebaker in a few months upon his receipt of ten thousand dollars from an "estate." (R. 1094.)

About March 1, 1935, James met Mary E. Busch, who subsequently became his wife, when she applied at his shop for a position as a beauty operator. (R. 721.) In April of 1935, James had a conversation with Louis Berry, an insurance man connected with the Mutual Life Insurance Company of New York, at which time he told Berry he knew of "some certain girl" that would be interested in taking some life insurance but that he was not prepared to tell him who the prospect was "until the prospect was ready." (R. 216, 217.) James wanted to know the cost of a five thousand dollar insurance policy on a girl twenty-six years of age. About two weeks later, Berry submitted to James a proposition for the five thousand dollars worth of insurance. The following week Berry asked James if he was prepared to give him the name of the prospect and James said he was, whereupon he called Mary E. Busch

from the rear of the barber shop and introduced her. (R. 218.) As a result of this meeting an application for insurance on Mary E. James, nee Busch, was executed May 7, 1935, for five thousand dollars worth of insurance in the Mutual Life Insurance Company of New York.

About a week before the application was actually executed, James told Berry that Berry's price was higher than that offered by a competitor. (R. 219.) About two weeks after the date of the application for the insurance but before the actual delivery of the policy, Mary James informed Berry that she was now married to James (R. 227.) James was named beneficiary. (Exhibit 22.) Prior to this the estate of Mary Busch was made the beneficiary. (R. 228.) Although Mary James thought she was married to James, she was in truth and in fact not married to him, because James had an annulment proceeding pending as to a prior marriage, and unknown to Mary he had caused a fake marriage to be performed, which was prior to the actual delivery of the insurance policy of this company on June 25, 1935. The fake marriage ceremony took place May 9, 1935, two days after the application for insurance was made with Berry's company. (R. 249-251.) The subject matter of insurance was first discussed with Mary James about the fourteenth or fifteenth of March, 1935. (R. 737.)

Between May 25th and May 28th, James negotiated with Max Galatz of the Occidental Life Company of Los Angeles, for two insurance policies on Mary James, one for seven hundred dollars and one for five thousand dollars. (R. 228-230.) James supplied the information in the application for insurance, stating that he was the husband of Mary James, and Mary James confirmed this statement. James was named the beneficiary and was told that he himself would have to have a larger amount of life insurance than his wife Mary or the policy could not be written. (R. 232, 234.) Galatz told James that he would have to take five thousand more insurance on his own life, and James said, "Really you know I want all the insurance I can get." (R. 234.) James at that time assured Galatz that he already had plenty of insurance on his own life to satisfy the company's requirement, and Galatz let the matter go for several days and checked with his company and then returned to James and actually took an application on the life of James in the amount of three thousand dollars. (R. 234, 235.) After obtaining the policy on his own life, James paid only one premium thereon. (R. 237.) The two policies on the life of Mary James were delivered to James and he paid for them at that time. (R. 236.) They provided for double indemnity in the event of accidental death. (Exhibits 25 and 26.)

Sometime in June, 1935, James asked Charles Hope, (R. 58), who frequented James' barber shop over a period of about seven years and on several occasions had borrowed money from James (R. 125, 126), if he knew anything about rattlesnakes. Hope replied in the negative. James said that he had a friend who had a wife that had been annoying him quite a bit, and he was going to kill her and wanted to get some rattlesnakes. James told Hope that if he would get some rattlesnakes he would give him $100. (R. 59, 60.) Toward the latter part of June, James inquired of Hope if he had found out about the rattlesnakes. (R. 60.) Thereafter, Hope purchased three rattlesnakes and obtained a quantity of rattlesnake venom in crystal form from a man named Kirby in Long Beach, California, and took the rattlesnakes and venom to James at his home in La Canada. (R. 62, 63, 170, 171.) Thereafter, Hope saw James at the barber shop and James offered to let Hope stay at his home in La Canada for a few days, which offer Hope accepted. (R. 64.) It appears that Hope was having domestic trouble with Mrs. Hope and was not living at home. (R. 714.) Thereafter, pursuant to James' instructions, Hope had two boxes made by a cabinet maker. These boxes were delivered to James' house by Hope. (R. 65, 66.) Hope ceased living at James' house about the middle of July and later saw James at the barber shop. (R. 67.) At this time James said, the "man" was dissatisfied with

the snakes, they are not fighters, there are good snakes to be had at the snake pit in Ocean Park where, he thought, they are sold by the pound. (R. 67.) Hope and James went to Ocean Park, which was in the month of July, 1935, and saw the snakes in the snake pit and James said to Allman, the snake man, that he would bet there was not a poisonous snake in the pit. Hope and James were noisy and appeared to have been drinking. (R. 68, 195.) On the following day Hope was there alone and purchased from Allman a rattlesnake for three dollars. Hope had a box with a glass top containing a rabbit and asked Allman to put the snake in the box with the rabbit to see if the snake was poisonous, and said to Allman that James had bet him fifty dollars there was not a poisonous snake in the place. Allman replied that he could not do that because of the Humane Society and told Hope to take the rabbit elsewhere for the experiment. (R. 196, 197.) Hope delivered this snake to James at the barber shop. (R. 69.) Thereafter, Hope saw James and James said the snake was no good, that he wanted "some fighters." Allman had told Hope that he had purchased the snake from "Snake Joe" Houtenbrink in Pasadena, California. Hope then went to Houtenbrink's and purchased two more rattlesnakes and delivered them to James. The trip to Houtenbrink's was made in James' car with Mrs. Hope. (R. 70.) Hope met Mrs. Hope at about 2 o'clock p.m., where she was working. (R. 178.)

She remained in the car while he took a box out of the car and went into the yard of Snake Joe's. Later, Hope returned with the box and they drove back to Los Angeles and he let her out of the car at her home. (R. 179.) He telephoned to James and drove to the barber shop with the snakes. This was about 6 o'clock p.m., August 3, 1935. (R. 69, 70, 146.) Hope and James rode away from the barber shop in James' car and at this time James told Hope that his wife had five thousand dollars worth of insurance which he was going to collect. (R. 71, 72.) At about 7 o'clock p.m. Hope met Mrs. Hope; they had dinner and at about 8 o'clock p.m. they went to a show. (R. 179.) The following day, August 4, 1935, which was on a Sunday, Hope drove to his wife's apartment and ate breakfast with Mrs. Hope at about 10 o'clock a.m. (R. 180); they went to La Canada in their coupe to "get the snakes back, which statement was stricken by the court upon motion. (R. 72, 180.) Hope left his wife waiting in the coupe on the corner near James' house. (R. 180.) This was between 12.30 or 1.00 o'clock in the afternoon. Hope saw James and they went to the garage where they had several drinks; the snakes were in the boxes in the garage, along side of which were three or four dead chickens. James had been drinking a little bit and told Hope that he could not have the snakes right then. (R. 73.) Hope returned to his wife and after talking with her, she drove away in

their car (R. 73, 180) and he went back to James' garage, whereupon James said, "You are in this thing as deep as I am. You have bought these snakes all over the country. Now bring the boxes in the house." (R. 73, 74.) Hope carried a box with a snake in it into the house and to the kitchen. There he saw Mrs. James lying on the breakfast table with adhesive tape over her eyes and mouth and tied to the table by a rope. (R. 74, 75, 665.) The box was placed on the breakfast nook seat close to the breakfast table, and James took hold of Mary's left leg near the calf and placed her left foot in the box at which time the snake struck while Mary's foot was on a level with or just above the head of the snake. (R. 665-668.) Mary was dressed in a nightgown and her legs and feet were bare. After her foot was removed from the box, Hope closed the lid of the box and took it out to the garage and waited. (R. 75.) In fifteen or twenty minutes James came to the garage and handed Hope a water glass full of whiskey and said, "What is the matter with you. What are you so nervous about. She is all right. Drink this, it will steady your nerves." They had several drinks. Hope asked James for the key to James' car, and said that he wanted to take the snake away. James said he would give him the key to his car. Later James gave him the key and Hope put the snakes and the dead chickens in the car and drove to Los

Angeles and got Mrs. Hope. They drove to Pasadena where the snakes had been purchased (R. 75, 76), arriving there at about 3 o'clock in the afternoon and Houtenbrink repurchased from Hope for $1.50 the same two snakes which he had sold to Hope on the previous day for $3. Houtenbrink kept these identical snakes at his snake farm and the identical snakes were produced as exhibits in the court room, they being the same ones he had sold to Hope on August 3d. (R. 204.) After Hope and Mrs. Hope left Houtenbrink's place in Pasadena in James' car and while driving around and about the City of Los Angeles, Hope threw the boxes from the car. (R. 76, 77, 182.) Later that evening Hope left Mrs. Hope at her home and at about 1.30 o'clock a.m., Monday, August 5th, Hope took the car back to James' house. (R. 77, 182.) James came to the car, got in it with Hope, and they had some drinks from a bottle, and James said, "Those snakes are no good either," and that he was going into the house and drown his wife, whereupon James left Hope. Hope stayed in the car and at about 4 o'clock a.m., James came out of the house and said, "That is that." (R. 77, 78.) James asked Hope to "stay here a little bit and I will take you into town." At about 7 o'clock a.m., Monday, August 5th, James came out of the house and said his wife was dead and he had cleaned up the house, and he asked Hope to help him carry out the body. Hope entered the house and found the

body of Mrs. James lying in hallway with her feet toward the bathroom and together they carried the body to the edge of fish pond at the rear of the house, but Hope refused to help put the body in the pond and went back to the car. Presently James came to the car with three blankets, some soiled clothes, some pieces of rope, and they drove in James' car to where Hope's car was in Los Angeles. While driving to Los Angeles James said to Hope, "Don't get all excited, don't be so nervous. I will take care of you when I get this money." James gave Hope thirty dollars, together with the materials taken from the house, and told Hope to dispose of "this stuff" and get out of town. (R. 78, 79.) Hope took the materials and put them in his car and drove to Mrs. Hope's residence where he left the blankets and destroyed some of the materials in the incinerator. (R. 79, 80.) The blankets were produced at the trial and identified by Hope and Mrs. Hope. (R. 90, 91, 183.) Mrs. Hope saw her husband on this occasion at about 8.30 a.m., and observed that he was "white and jittery and had been drinking." (R. 182.) Hope identified at the trial some pieces of rope which were exactly like the rope that was used to tie Mrs. James to the kitchen table (R. 81.) and these particular pieces of rope were found by a district attorney's investigator, in a trunk belonging to James, which trunk had been stored by James after the murder, in the home of Mrs. Smith, James' niece. (R. 185, 187, 188, 189.)

OTHER PERTINENT FACTS AND CIRCUMSTANCES

On July 10, 1935, James made the acquaintance of Madge Reed at the Italian Village where they had some drinks together and James became quite intoxicated. He told her that he was on a vacation from Kansas City and lived with his sister. Madge Reed drove him to his home in his car. While there Mary James arrived from a convention in Long Beach. Madge Reed thereupon left and rode home on a bus. On the following day James telephoned Madge Reed and apologized for taking her to his home as he had not expected his wife to be home that day and asked her to go to San Diego with him. Between July 11, 1935, and August 3, 1935, the Saturday before Mary James' death on August 5, 1935, James called Madge Reed on the telephone on numerous occasions and wanted her to go out with him. (R. 416-420.)

Mary James became pregnant and from and after July 16, 1935, she was attended by Doctor George for nausea and sleeplessness. (R. 782.) On July 19, 1935, James was legally married to Mary at Santa Ana, California. (R. 249.) On July 29, 1935, James called Berry, the insurance man for the Mutual Life Insurance Company of New York. (R. 221.) On July 30, 1935, James talked with Berry and wanted to know if it would make any difference in a life insurance policy if the applicant had stated that she was married when in truth and in fact she was not married, and that Mary had

said she was married but was not actually married to him until July 19, 1935. Berry agreed to submit the question to the company and asked James for the marriage certificate and the insurance policy for the purpose of forwarding these documents to the company in connection with the inquiry. At that time, James actually had in his coat pocket the policy and marriage certificate which he then and there gave to Berry, taking Berry's receipt therefor. (R. 221, 222.) On August 3d, James called Madge Reed on the telephone and asked her to go out with him. (R. 420, 421.) On August 5th, Berry returned the policy and marriage certificate to James at the barber shop, inquired about the health of Mrs. James and was informed by James that she was getting along nicely. Berry was a customer of James and each week when he was in the barber shop Berry inquired about the health of Mary James because of her absence from the shop and was told on each occasion that Mary was ill at home but was doing nicely, that she had health insurance and was in no hurry to get back to work. (R. 222, 223.) At the time Berry returned the insurance policy and marriage certificate to James and inquired about Mary's health, Mary was dead and her body was in the fish pond, as hereinbefore related.

In the neighborhood of about two weeks before the death of Mary James, which would be somewhere about the twentieth of July, 1935, James

called Waddell, who was unit manager of the Occidental Life Insurance Company, and Waddell went to see James. James met Waddell at the entrance to the barber shop and he asked Waddell to walk up the street with him. James entered a liquor store and went into the lavatory and Waddell followed. James said he was anxious to learn what the status of the insurance on Mary James would be in the event of her death if the insurance had been applied for out of wedlock, that he and Mary had contemplated being married, but at the time of the insurance were not married, that Mary had been called to Long Beach for some dental work and had been detained there, but that they had subsequently been married. Waddell informed James that the matter should be submitted to the company and that he could give him no definite answer. (R. 241-245.)

On the day of the murder, Monday, August 5, 1935, James arrived at his barber shop at some time before 9 o'clock a.m. (R. 741.) At about 2 o'clock p.m. August 5th, James called Viola Pemberton on the telephone and said that Mary was not feeling well enough to come to town to keep their previous dinner engagement. Viola Pemberton and Mary had known each other for about two years (R. 2), and on the previous Wednesday the Jameses and the Pembertons had agreed to have dinner together on the following Monday evening either in town or at the James' home in La Canada, depending upon the

Pembertons being informed by James on Monday whether they would have dinner in town or at his home. (R. 13.) During this telephone conversation on Monday, James told Viola Pemberton that Mary had vegetables ready, and that Viola and her husband were to go to his home. They arranged to meet in front of the telephone office, where she worked, at 7.30 p.m. (R. 3.) Pursuant to said appointment they went to James' home, arriving there shortly after 8.00 p.m., and entered the back door. The house was dark and a search was made for Mary James. (R. 3, 22.) James and Mrs. Pemberton called out Mary's name, but there was no response. James found a note as they went to open the front door to see if Mary was on the front porch. James read the note to them and there was no way of telling from the note when it had been left there but it stated that "someone" had been there. After looking through the house James suggested getting lights and looking outside. Mr. Pemberton looked around the front yard and then walked around to the back yard where he found the body of Mary James as heretofore described. (R. 22, 23.) The note just referred to had been written by Ethel Smith, a niece of James, on Sunday, August 4th, about 5.00 p.m., at which time Ethel Smith stuck the note in the crack in the front door, observed that all the shades were down and looked around the premises for fifteen or twenty minutes.

(R. 185, 186.) As we have heretofore related, Hope, at about this hour was returning the snakes to "Snake Joe" in Pasadena in James' car and disposing of the boxes. James, according to his conflicting stories, as hereinafter related, claimed to have been at Mt. Wilson with Mary in the car, and also on a drive with Mary through Flintridge and Glendale and also out on an afternoon walk with Mary.

At about 8.30 p.m. August 5th, the day of the murder, after the body was found, sheriff's deputies came and looked over the scene. (R. 49.) On the dining room table was found a letter in a sealed envelope addressed to Mary's sister in Nevada. Mrs. Pemberton opened the letter in the presence of the officers and read it aloud to them as she was instructed to do by James. (R. 8, 9.) She asked "Where is the other note?" whereupon James said he did not know but "fished" around in his pockets and found it. (R. 51.) The letter addressed to Mary's sister is as follows:

> "Dear Sis: Just a line this morning to let you know I am pretty sick. My leg is all swollen. Something bit me while watering my flowers this morning. I cut my toe yesterday, and having lots of bad luck. It is ole blue Monday, but my daddy will be home early tonight and he takes good care of me. Be sure and write me soon. I will let you know how I get along." (R. 409, 410.)

Exemplars of Mary James' normal handwriting were introduced in evidence (R. 10.) and by comparison they showed that this letter was not in Mary's normal handwriting. (Exhibits 4 and 5)

When Mary James' body was found it was observed that her left leg was swollen and very blue (R. 49), that there was a cut on the left big toe, and that between the ankle and the knee the leg was very dark and almost black. (R. 57.) On August 6, 1935, an autopsy was conducted by Dr. Wagner. (R. 94.) He found a laceration on the lower surface of the left great toe; the left foot was considerably swollen; there was no evidence of disease of the vital organs; there were superficial bruises of varying extent on various parts of the body; there was no poison found in the stomach, liver or kidneys; and he found a normal six-weeks pregnancy and no evidence of an abortion or attempted abortion. (R. 93, 792.) He attributed the death to drowning and acute cellulitis of the leg, which was swollen up to the hip, and stated that the discoloration extended to the knee and was "quite marked". There were bruises on the right arm and chest, a slight bruise and scratches on the left arm and discoloration of the back of the right leg up to the knee. (R. 94, 95.) He testified that cellulitis is usually caused by bacteria (R. 95); that bacterial infection causing cellulitis takes from two or three days to a week, as a rule, but that animal poisons causing cellulitis go much faster (R. 96); that cel-

lulitis of this kind is caused by venom or insects, snakes, spiders and the like, and that the cellulitis of the kind found in this autopsy could have been cause from the bite of one of such reptiles. (R. 97.) On May 5, 1936, about nine months after the first autopsy, a second autopsy was conducted, after the body was exhumed, in the presence of Dr. Boehme. The left leg and toe were reexamined and Dr. Wagner reached a conclusion that the laceration of the toe could have been made by a rattlesnake fang (R. 98, 99); and that the cellulitis present in deceased was not of the bacteriological type but was of the "animal poison" type, and "could have been" caused by the bite of a snake. (R. 1092.) At the time of the original autopsy Dr. Wagner did not think about snakebite. (R. 105.) The scratches and marks on the body below the head and face were, in his opinion, made during life rather than after death. (R. 108.) The left leg was markedly discolored and almost mahogany in color, and this condition was probably produced by a snakebite, according to the testimony of Dr. Boehme. (R. 110.)

A few days previous to the death of Mary James, James told Mrs. Pemberton that Mary was "crazy to have a baby but I don't want one". (R. 1113.) After Monday night (August 5, 1935) James spoke to his niece, Ethel Smith, about the note which she and her husband had left under the door on Sunday, August 4th, about 5 o'clock. James thought

the note had been left on Monday and said to her, "Why were you there on Monday?" Ethel Smith said she had been there Sunday, and during the conversation he told her that he and his wife Mary had driven to Mt. Wilson on Sunday. (R. 186.) On Wednesday, August 7, 1935, James told deputy sheriffs investigating the matter, that on the afternoon of Sunday, August 4th, he and Mary had taken a drive in the afternoon through Flintridge, coming back to the house by way of Glendale. (R. 762.) At the trial, James testified as a witness in his own behalf that on that same afternoon, Sunday, August 4th, he loaned his automobile to Charles Hope and thereafter, during the afternoon, he (James) and his wife Mary had gone out for a walk and were away from the house about an hour and a half, between 4.00 p.m. and 5.30 p.m. (R. 761). On August 7, 1935, while talking with deputy sheriffs regarding the death of his wife Mary, James told them he had no knowledge whatsoever that Mary had cut her toe or hurt herself in any way, that the first he knew of the matter was from the letter found at the house after her death, which was addressed to her sister. (R. 785, 786.) At a trial in the Federal Court on March 31, 1936, in an action entitled Robert James vs. Mutual Life Insurance Company of New York, James testified under oath that he never knew his wife Mary to faint at any time. (R. 765, 785.)

On August 11, 1935, six days after the death of Mary James, James called Madge Reed, the woman he had met at the Italian Village on July 10, 1935, heretofore related, on the telephone and asked if she had been reading about his wife's death in the newspapers, and said he wanted to talk to her about what had been in the papers. She consented and James went to her apartment, and the two then went for a ride in his automobile. James told her about his wife and how "they" were trying to frame him on the case, that he didn't believe in mourning, that as long as his wife was dead he would collect the insurance, that he would marry her (Madge Reed) and take her north, and that if he was indicted he wanted to spring her as a surprise witness and would give her two thousand dollars to testify that she had met him and his wife five weeks previously at the Italian Village, and on the morning of his wife's death she, Madge Reed, was out for a ride and saw his wife standing on the porch, that his wife explained she was not feeling well, that his wife then went and lay in the hammock and said she had a sore on her leg. James and Madge Reed registered at a hotel in Hermosa Beach for the night and when he left her the next morning he gave her sixty dollars to show that he really meant business and she was to receive from him the two thousand dollars whether she testified or not. She made notes on a card pursuant to his request setting

forth the time she was supposed to have met him and his wife. He also gave her Mr. Silverman's name and telephone number. (R. 421-424.) Mr. Silverman was James' lawyer. (R. 481.)

Between the fifteenth and twentieth of August, 1935, James conferred with Berry, the representative of the Mutual Life Insurance Company, and in several conversations on different occasions, James asked whether the company would pay double indemnity under the policies on Mary James, as the result of her having died in an accidental manner. (R. 223, 224.) In litigation which followed after deceased's death James claimed double indemnity under the provisions of the policies in the Occidental Life Insurance Company, but settled for the sum of $3500 (less than the face value of the policies). (R. 1093, 1094.)

About the 22d of March, 1936, J. C. Southard, an investigator for the district attorney's office commenced an investigation into the death of Mary James, and while investigating this matter, he arrested James on a felony committed in his presence, i.e., the crime of incest on Sunday, April 19, 1936, at about 9 o'clock a.m. (R. 456, 458, 463, 560, 561.) James was taken before the district attorney who questioned him about the incest and showed him a typewritten statement made by James' niece, Lois Wright, confessing the offense, at which time James refused to talk to the district attorney. (R. 466, 467, 468.) James at about 5

o'clock that afternoon was taken to a house adjacent to the one he was living in on LaSalle Street in Los Angeles and questioned by the police and investigators of the district attorney's office. (R. 555, 560.) He was returned to the district attorney's office on Monday, April 20, 1936, where he conferred with his counsel, Mr. Silverman. (R. 571.) On April 21, 1936, at about 10 or 11 o'clock a.m., James was booked in the county jail. (R. 576.) On this same day he was arraigned in the superior court on the crime of incest and was represented at the arraignment by his attorney, Mr. Silverman. (R. 483.) Between the time of his arraignment on said charge of incest and May 2, 1936, his attorney, Mr. Silverman, visited him in the county jail on April 25, 1936, and saw him on several days thereafter until about a week later at which time Mr. Silverman called upon petitioner in the attorney's room at the county jail and advised him that if questioned, not to answer any questions unless it was in his (Silverman's) presence. (R. 481, 482.) James was not again interviewed by the authorities until about 11.45 a.m., May 2, 1936, at which time he was taken to the Chaplain's room in the county jail and told in the presence of Hope, who was arrested on May 1, 1936, that Hope had confessed and he (James) was asked if he had any statement to make relative to anything stated by Hope which incriminated him (James) in the death of Mary James and answered "nothing." (R. 493, 494.

630, 631, 732, 733.) Later in the day on May 2, 1936, James was again interviewed by the authorities and after having his dinner and while seated in the cafe, he freely and voluntarily gave his version as to the death of his wife which statement was later reduced to writing and read in evidence at the trial. (R. 631, 632, 641-660.)

Sometime between April 21, 1936, and May 2, 1936, James was taken before the grand jury and indicted for the crime of incest and on May 6, 1936, he was indicted with Hope for the murder of Mary James. (R. 493, 815.) James was tried first under the indictment charging incest and after his conviction of said crime, he was tried on the murder charge, the proceedings which resulted in his conviction of said crime being now under review by this Honorable Court for asserted error therein. (R. 502.)

In addition to the evidence hereinbefore set forth, certain facts were admitted by James in his testimony while a witness in his own defense. He admitted that he had known Hope for seven or eight years (R. 713); that Hope had stayed at his house three or four days in July, 1935 (R. 714); that Hope was in the garage with him while he was "treating" some chickens for a cold (R. 714); that Hope said he was broke (R. 714); that Hope had a box with some yellow stuff in it which he said was rattlesnake venom and wanted to experiment with it on a chicken (R. 715); that thereafter and

on the sixth day of July, 1935, he saw Hope at the barber shop and gave him a key to his (James') house. (R. 715.) James testified that he introduced Hope to his (James') wife and to his sister at breakfast as "Dr. Smith" (R. 716); that at breakfast Mary James was nauseated because she was pregnant, and said "Dr. 'Hope' (evidently meaning Dr. Smith) will take care of me"; that Hope said he would (R. 716); that he (James) didn't know what it was all about (R. 716); that he (James) was pleased because Mary was pregnant and Mary was also very pleased at the time (R. 717); that Hope remained at the house until the following Wednesday and then left and did not return again until August 3, 1935; that he had permitted Hope to take his (James') automobile many times (R. 717); that he had loaned Hope money and had given him money in the barber shop many times (R. 717); that he first met Mary James on March 1, 1935 (R. 721); that Mary James applied at the barber shop for a position as a beauty operator (R. 721); that he aided Mary James to take out insurance (R. 722); that some time after he had been placed in the county jail, officers took him to the chaplain's room in the county jail, at which place Hope was present, and there the officers told him the story that Hope had told them and then asked what he had to say about it, and he said he had nothing to say about it (R. 732, 733); that he knew Madge Reed and met her at the cafe

one afternoon where they were drinking cocktails; that while his wife was away, Madge Reed had driven him to his home (R. 735, 736); that the first time he talked to Mary James about insurance was about two weeks after the first of March, 1935 (R. 737); that the matter was discussed every few days until she got the insurance (R. 737, 738); that on Saturday, August 3, 1935, he loaned Hope his car and Hope returned it the same day (R. 742, 743); that on Sunday, August 4, 1935, Hope came to the house and said he had made arrangements with Mary James to perform an operation on her and that Mary had informed him (James) on Friday that it was to take place, but he (James) had begged Mary not to do it (R. 743); that on Sunday, August 4th, Hope told him what he was there for; that he didn't want Hope to talk about "it" as it was against his wishes; that he left the house and didn't return until one o'clock Sunday afternoon; that Hope stayed with Mary James at the house and took care of her while he was away (R. 744); that at 1.00 o'clock Sunday afternoon, Hope left his (James') house with his (James') automobile and kept it until 6.30 Monday morning, August 5th (R. 744); that Mr. and Mrs. Pemberton had previously arranged to have dinner at his home August 5, 1935 (R. 744, 745); that on the morning of August 5, 1935, before he left home he had a conversation with Mary in the presence of Hope; that Mary stated she had not started to

menstruate and Hope said he would take care of that, for him (James) to go to work and he (Hope) would probably spend the day there (R. 750); that later in the day, Hope called him on the telephone and said he had come to town (R. 750); that he knew at the time he discovered Mary's body in the fish pond on the night of August 5, 1935, that Mary and Hope had been discussing the commission of an operation on her by Hope and Hope had said he intended to do something to do away with her pregnancy, but that at that time he did not believe she had di as the result of an operation by Hope and didn't think Hope had anything whatsoever to do with her death (R. 755); that when he talked to Hope on the telephone on August 5th he didn't ask Hope anything about an operation or abortion upon Mary James; that he did not ask Hope anything about Mary's condition (R. 776, 777); that he did not make any report to any officer or official to the effect that immediately prior to his wife's death Hope had performed an abortion upon her; that he believed that Hope had performed an abortion upon Mary (R. 778); that on August 7, 1935, his belief was that Mary had fainted and fallen into the fish pond; that he did not believe that Mary's death was due to the cut on her toe or the bite of an insect (R. 778, 779), that Mary had told him she had cut her foot out in the yard on a tin can (R. 751); that he didn't know anything about her toe being hurt (R. 772); that on the thirty-first

of March, 1936, while testifying in the Federal Court he might have said that he had never known Mary to faint (R. 756); that he probably did tell officers on August 7, 1935, that he and Mary had gone for a drive through Flintridge, coming back by way of Glendale, on Sunday, August 4, 1935; that he arrived home with the Pembertons on the evening of August 5, 1935; that upon finding the house dark he became alarmed and felt that maybe Mary had fainted "around" the chicken house in some way (R. 740, 762); that he and Mr. Pemberton went out the rear entrance of the house together with flash lights; that he went back to the chicken house and that Mr. Pemberton found Mary at the side of the house in the fish pond. (R. 740.)

The entire foregoing recitation of the evidence has been made without reference whatsoever to the contents of any alleged confession of James. The alleged confessions, about which James complains, were obtained May 3, 1936. The exact details of the manner in which those confessions were secured are recited in our argument under Point I of this brief. The confessions proved James' guilt of the murder of Mary James beyond peradventure.

In addition to the foregoing, the people placed in evidence, for the purpose of establishing beyond any reasonable doubt that the death of Mary James was premeditated murder and not the result of an accidental cut on the toe or insect bite from which she fainted and accidentally fell into the fish pond

and drowned, facts and circumstances surrounding the death of a previous wife of James who was found dead under conditions quite similar to those present in the instant case. This evidence showed that the death of Mary James was consummated in accordance with a plan and scheme formulated and used by James over a period of years to obtain, whenever needed, large sums of money from insurance companies. The particulars of the murder of a previous wife by James are set forth in this brief under Point III, in answer to petitioner's contention that the admission of this evidence contravened his rights under the Fourteenth Amendment of the Constitution of the United States.

SUMMARY OF ARGUMENT

The theory upon which the case was presented by the people was that petitioner, in league with Hope, had plotted and consummated the death of petitioner's wife for the purpose of collecting and dividing the proceeds of certain insurance policies on her life and that the homicide was perpetrated in such manner as to give the appearance of accidental death, not only to allay suspicion but in order to bring into operation the double indemnity provisions of the insurance policies. Under this theory the people submitted evidence showing that petitioner and Hope undertook to bring about the deceased's death by means of a deliberately inflicted poisonous rattlesnake bite, the assumption probably being that, if fatal, such bite or laceration would

appear to have been incurred in or about the garden of her home by stepping on a tin can or having been bitten by an insect, and that this ingenious method of destruction having proved ineffective, the conspirators accomplished their objective by deliberately drowning the deceased in the bathtub of her home, whereupon her body was placed in the fish pond on the premises to further the accidental appearance of her demise.

I. Introduction of the Confessions

There was no force, violence, threats, coercion or any unlawful means employed that in anywise induced petitioner to confess his participation in the commission of the crime. He freely and voluntarily offered to speak and give his version of the affair after and only after the accomplice Hope had been apprehended by the authorities and had confessed the killing and related the manner and the method by which and the purpose for which it was accomplished. The apparent object of petitioner in speaking at this time when confronted with Hope's statement was to shift the responsibility for the taking of the life of deceased upon Hope. Of course, petitioner, when his confessions were offered in evidence by the people, strenuously objected to their introduction and gave testimony which raised a dispute as to whether the confessions were free and voluntary, and the court, under instructions offered by petitioner on the subject, left this question with the jury, a procedure well

recognized by law in the State of California. Under the authorities of this Honorable Court, before a conviction will be set aside on the ground that it was illegally obtained by the introduction in evidence of an alleged confession, three elements must be present, namely, (1) the confession must have been obtained by compulsion; (2) the fact that such compulsion must be shown by undisputed or uncontradicted evidence; and (3) the confession must be the sole or at least a principal part of the evidence upon which the conviction rests.

The evidence of the people given on *voir dire* examination overwhelmingly refuted the contention of petitioner herein, made at the trial, that he was beaten, threatened, frightened, questioned until he fainted, and confessed because of fear of a recurrence of such beatings. Such evidence further refuted his contention that he was deprived of sleep and food and of his right to counsel.

Before petitioner made any confession of his participation in the commission of the alleged crime, he was while confined in the county jail confronted with a statement made by his accomplice Hope and was asked if he had anything to add thereto and replied "nothing." Under the law of California, when a person, under conditions which fairly afford him an opportunity to reply, stands mute in face of accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilty. Later in the

day, while being interviewed in the office of the district attorney, he said, "Why don't we go out and get something to eat and I will tell you the story." He was taken to a cafe in a prominent business portion of the City of Los Angeles where he freely and voluntarily related the circumstances relative to his participation in the murder of the deceased. He reiterated his story shortly thereafter in the office of the district attorney in the presence of a stenographic reporter, at which time he stated that he never would have told the story if Hope hadn't told it. He knew that he was not required to talk about the matter because he had been told by his own counsel, Mr. Silverman, before he had made any statement regarding the crime, that if the officers questioned him to tell them he wouldn't talk unless Mr. Silverman was present.

Furthermore, petitioner's guilt was established by evidence independent of any confession made by him. Hope in his testimony related facts and circumstances which incriminated petitioner in the death of the latter's wife, and Hope's testimony was corroborated by other evidence which tended to connect petitioner with the commission of the crime. The instant case does not present a situation where a defendant, whose guilt was not otherwise established, was convicted solely by evidence of a confession wrung from him while he was dominated and his mind subjugated by officers of

the law. To the contrary, it presents a situation where the guilt of petitioner was established by evidence independent of his confessions and where petitioner seeks to escape just punishment for his brutal crime by falsely claiming that the confessions, which were part of the proofs against him, were obtained by brutal and coercive methods.

II. Introduction of the Rattlesnakes

The bringing of live rattlesnakes into the courtroom and exhibiting them to the jury did not create a state of fright upon the jury. This is apparent from the fact that defense counsel at a later time in the trial and during the development of the case by the defense again produced the snakes and thus risked a repetition of the situation of which complaint is here made. At the time the snakes were brought into the court room and at all times during their presence before the jury, they were confined in a substantial enclosed box with sufficient glass to permit the snakes to be seen. They were identified as the two snakes that were sold to the accomplice Hope two days prior to deceased's death, one of which Hope testified was the snake employed by petitioner and him to inflict a poisonous bite on the deceased's left foot when it was pushed by petitioner into the box containing the reptile. The autopsy surgeon had testified that he found a laceration on the surface of deceased's great left toe; that her left foot was considerably swollen and

discolored, the swelling extending up to the hip, and that deceased's lungs contained a considerable amount of water. He gave as the cause of death, "drowning and acute cellulitis (swelling) of the legs." He further testified that cellulitis resulting from a bacterial infection would take from two or three days to a week to reach the extent it had in the deceased but that if caused by animal poisons it would progress much faster; that the cellulitis present in the deceased was not of the bacteriological type but was of the animal poison type and could have been caused by the bite of a snake; that when he again examined the deceased's body following its disinterment he was of the opinion that the laceration on the deceased's toe was caused by a rattlesnake bite. Similar evidence was given by Dr. Gustave Boehme, an expert on snakes and snakebites. It is a fundamental principle of law that the medium employed to bring about the violent or untimely death of the victim is admissible in evidence as part of the res gestae. Such evidence is not to be suppressed merely because it may strongly tend to agitate the jury's feelings. As a general rule, physical objects which constitute a part of the transaction, or which serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under judicial investigation. Moreover, the production of the identical snakes tended to corroborate the testimony of the prosecution witnesses and to otherwise sup-

port the case of the people. If the prosecution had failed to produce said snakes, this fact would have weighed heavily against its theory of the case.

III. Admissibility of the Colorado Affair

At first blush the death of the wife of petitioner appeared to have been free of any criminal agency. The burden of proving that her death was not accidental but was caused by the use of criminal means rested upon the prosecution. The fact, if capable of being proved by the prosecution, that a former wife of the accused had been found dead under circumstances similar to those surrounding the death of the one for which he was on trial, would tend to give credence to such other evidence in the case showing that the deceased had been murdered, which evidence otherwise might seem doubtful, especially when given by an alleged accomplice. There is no provision of law in the State of California which requires, nor does the due process clause of the Federal Constitution require, that such matter be charged in the indictment or that previous notice of the use of such evidence by the prosecution be given to the defendant.

However, such evidence did not come without notice to petitioner for he was questioned prior to his indictment about the death of his former wife, Winona James, and at the commencement of the trial the opening statement of the people indicated that testimony of this kind would be offered. Peti-

tioner had the right to take depositions of witnesses who resided outside of the State of California and offer such depositions in evidence if he so desired but which he failed to do. After the trial had been in progress for a number of weeks, he requested a continuance thereof to take depositions but his request was denied for insufficient showing therefor, as required by the law of California, namely, the filing of affidavits in support of such motion for continuance setting forth facts warranting the trial court in granting such application.

Where one is charged with murder it is within the discretion of the trial court to permit the introduction of evidence tending to establish a prior murder where the proof of such prior murder tends to throw light upon a particular fact or explain the conduct of a particular person, which fact or conduct has a bearing upon some issue in the case for which a defendant is on trial. It is the settled law of California that where the accused is on trial for the murder of his second wife the prosecution may introduce evidence as to the death of the first wife and the fact that her life was insured with the accused as beneficiary to show the motive of accused in the murder of his second wife. Where it is claimed by the accused that the act in question was innocently or accidentally done, or done by mistake, or where the evidence is susceptible to such an inference, proof of other acts of the same general character is admissible to show that the act in question

was the product of a designing mind rather than the result of mistake, accident or misfortune. In its instructions to the jury, the trial court properly limited the purpose for which the jury might consider this evidence.

IV. Affidavits of Witness Hope

The affidavits of the witness Charles H. Hope, wherein he states that his testimony was false and known to the prosecution to be false, were filed in connection with a motion to set aside the judgment rendered upon his plea of guilty to the murder of Mary James, which motion was presented to the trial court approximately three years after he had been sentenced to imprisonment in San Quentin for life. Petitioner has made said affidavits a part of the record herein by including them in his petitions filed in the Supreme Court of the State of California for a rehearing and for a writ of habeas corpus. Obviously, the matter set forth in the affidavits was not a proper subject to be considered by said Supreme Court for a rehearing, but it could have been and evidently was considered by said court on the petition for a writ of habeas corpus. As to the latter petition the said court had before it the record in the case, which was included in the petition by reference. Consequently, said court had before it a great mass of evidence which was entirely in conflict with the statements contained in Hope's affidavits. The overwhelming weight of the

evidence as disclosed by the record was to the effect that Hope had not testified falsely and that his belated claim to that effect was merely the effort of a guilty man to escape the punishment which he was suffering for his crime. The petition was denied without prejudice, thereby leaving the matter in such state that if the petitioner could thereafter make a reasonable and clear showing of his right to a writ of habeas corpus, the Supreme Court of California was still in a position to grant such writ.

V. Right of Counsel

The record does not bear out petitioner's assertions that he was held incommunicado for two days and nights in a private home without being taken before the nearest and most accessible magistrate and without being allowed counsel of his choice; that thereafter he was held in jail in the "High Power Tank", and was constantly under observation and his counsel visited him only once, and that he was told, when he asked the officer to call attorney Parsons, it would take too long to inform Parsons about the case.

The record shows that petitioner had counsel of his own choice the day after his arrest who continued to see him at various times thereafter; that petitioner was taken before the superior court, the only court with jurisdiction in the matter where an indictment is found, within two days after his

arrest, and that the officers attempted to communicate with attorney Parsons but were unable to reach him because it was on a Saturday afternoon.

Petitioner's claim that a certain canon of professional ethics was violated in this case begs the question of the validity of a conviction for crime based upon competent and sufficient evidence.

Under the decisions of the appellate court of the State of California, an accusatory statement is not rendered inadmissible by the fact that the accused remained silent upon advice of his counsel.

VI. Equal Protection of the Laws

Petitioner, in claiming that he was denied equal protection of the laws on the same grounds he claims he was denied due process of law, has misconstrued the purport of this constitutional guarantee. The equal protection clause of the Fourteenth Amendment of the Constitution of the United States has to do with the intentional and systematic discrimination by the law itself or by those charged with its enforcement and not with individual invasion of individual rights, nor with mere error of judgment on the part of officials of the law.

ARGUMENT

I. NEITHER THE DUE PROCESS NOR EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT WAS INFRINGED BY THE ADMISSION IN EVIDENCE OF PETITIONER'S CONFESSIONS

It is the contention of respondent that the evidence supports the conclusion reached by the trial court and jury that petitioner's confessions were free and voluntary and were not procured by virtue of third degree methods, or by prolonged questioning without sleep being accorded petitioner, or by the use of torturous means, mental or physical.

1. Presentation and Discussion of Authorities

In approaching a discussion of the facts of this case it may be well to first refer to a few of the decisions of this Honorable Court and other Federal courts which, in our judgment, announce the correct rule of law applicable to cases where the confession introduced in evidence at the trial was procured by the use of such means and methods as rendered the conviction void, as violative of the due process clause of the Fourteenth Amendment.

One of such cases is *Ziang Sung Wan* vs. *United States*, 266 U. S. 1, 45 S. Ct. 1, (opinion written by Mr. Justice Brandeis), in which the facts showed without conflict that Wan was taken into custody in New York on February 1st, at a time when he was

sick in bed; that he was taken to the City of Washington, D.C., against his will; that he was kept in a room in a hotel until February 9th, being at all times sick; that on the eighth day after his arrest he was taken to the scene of the crime, shown the premises and various objects connected with the crime, and questioned from 7 p.m. to 5 a.m. without sleep; that on the tenth day he was again questioned at the scene of the crime; that on the eleventh day a formal confession was taken and was signed and initialed by him; that on the thirteenth day he was visited by the chief medical officer of the jail who found him lying on a bunk in his cell seriously ill and very weak, exhausted, emaciated, complaining of intensive abdominal pain and vomiting if he attempted to take food; that his bowels were difficult or impossible to move unless assisted by an enema; that he was in bed for a month thereafter under the case of this doctor who expressed the opinion that at the time he saw Wan on February 13th, Wan had been ill for a matter of weeks and was in such bad condition that he would have signed a confession, which would lead him to the gallows, "if he wanted to be left alone," and that "he would do anything to have the torture stopped." This was the uncontroverted evidence touching the circumstances and conditions under which Wan's confession was obtained.

The Court said:

> "The undisputed facts showed that compulsion was applied. As to that matter there was no

> issue upon which the jury could properly have been required or permitted to pass. The alleged oral statements and the written confession should have been excluded."

Mr. Justice Brandeis stated the question at issue as follows:

> "The main question for decision is whether, on the facts disclosed in the testimony of the superintendent of police, three detectives and the chief medical officer of the jail, the trial court erred in admitting as evidence statements made by the defendant to the police officers before and shortly after his formal arrest."

The court of appeals in the *Wan* case appears to have held prisoner's statements admissible on the ground that a confession made by one competent to act is to be deemed voluntary as a matter of law if it was not induced by a promise or a threat, and that there was evidence sufficient to justify a finding of fact that these statements were not so induced.

This Honorable Court held, however, that a confession obtained by compulsion, even though not induced by a promise or a threat, must be excluded whatever may have been the character of the compulsion and that the circumstances of Wan's having been subjected for seven days to interrogation before making the first of several confessions, in view of all of the circumstances, was sufficient to show compulsion.

In the case of *Brown* vs. *State of Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682, on writ of certiorari to the Supreme Court of the State of Mississippi, in an opinion written by Mr. Chief Justice Hughes, it was held that the use of a confession obtained by coercion, brutality and violence as basis for conviction and sentence, constituted denial of due process under the Fourteenth Amendment of the Constitution of the United States.

The facts in that case are important. In the first place, the convictions rested *solely* upon confessions shown to have been extorted by officers of the State by brutality and violence. Aside from the confessions, there was no evidence sufficient to warrant the admission of the case to the jury. The confessions were received over the objections of defendants' counsel. There was no dispute as to the facts with relation to the manner in which the confessions were obtained. These facts are briefly as follows:

As to the defendant Ellington, he, an ignorant Negro, was taken from his home by a number of white men including a deputy sheriff, who took him to the home of the deceased and accused him of the crime. Upon his denial they seized and hanged him by a rope to the limb of a tree, let him down, then hanged him again, and when he was let down the second time, still protesting his innocence, he was tied to a tree and whipped. Still declining to confess, he was finally released and returned with

some difficulty to his home. The evidence showed that the signs of the rope on his neck were still plainly visible at the time of trial. A day or two after the foregoing ordeal he was arrested and taken to the jail in an adjoining county. On the way to the jail the deputy in charge of him stopped and again severely whipped him and continued to whip him until the defendant agreed to confess. Upon reaching the jail he did confess.

The defendants Brown and Shields, also ignorant Negroes, were arrested and taken to the same jail, where the same deputy, accompanied by a number of white men, made them strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were informed that the whipping would be continued until they confessed in detail as demanded by those present. The defendants did confess, and as the whippings progressed and were repeated, they changed or adjusted their confessions in all particulars of detail so as to conform to the demands of their torturers. There was other evidence of brutal treatment It was said by the Court to read "more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government."

The confessions were obtained on April 1st, repeated on April 2, 1934. Defendants were indicted on April 4th and tried on April 5th and 6th. The

evidence upon which the conviction was obtained was the so-called confessions. Without this evidence a peremptory instruction to find for the defendants would have been inescapable.

This Honorable Court stated that by the undisputed evidence the confessions had been obtained by the brutal methods above described, and said:

> "The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner."

It then ordered the judgment reversed.

In *Chambers* vs. *State of Florida*, 60 S. Ct. 472, decided by this Honorable Court on February 12, 1940, in an opinion written by Mr. Justice Black, the "grave question" presented by the petition for certiorari being whether the proceedings in which confessions were utilized and which culminated in sentences of death upon four young Negroes in the State of Florida failed to afford the safeguard of that due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States, this Court first succinctly stated the rule governing this matter as follows:

> "However, use by a State of an improperly obtained confession may constitute a denial of

due process of law as guaranteed in the Fourteenth Amendment."

The facts showed that an elderly white man was robbed and murdered. After discovery of this murder, from twenty-five to forty Negroes living in the community, including the defendants, were arrested. Some of the Negroes, including two of the defendants, were taken from jail to another county for incarceration. During the ride one of the guards stated in the hearing of defendants that they were being taken to escape a mob. Later these Negroes were returned to the original jail. It was clear from the evidence of both the State and the defendants that for a period from May 14th to May 20th these Negroes, including defendants, were subjected to questioning and cross-questioning. There was no time during the week in which they were permitted to see or confer with counsel or a single friend or relative. The officers were in the jail almost continually during the week questioning the Negroes in connection with this case. The testimony was in conflict as to whether the defendants were continually threatened and physically mistreated until they confessed. However, according to the opinion of this Honorable Court, it was *certain* that by Saturday, May 20th, five days of continued questioning had elicited no confession. At about 3.30 o'clock on Saturday afternoon a "concentration of effort" was brought to bear upon a number of prisoners, including

defendants, which resulted in continuous questioning through the night till sometime in the early hours of the following morning when one of the defendants "broke," whereupon the State's Attorney was awakened and brought to the jail, but after hearing the confession then obtained was dissatisfied with it. Consequently the questioning was continued, and just before sunrise confessions were obtained which were satisfactory to the State's attorney. One of the confessing defendants pleaded guilty. The Court said:

> "When Chambers was tried, his conviction rested upon his confession and testimony of the other three confessors. The convict guard and the sheriff 'were in the Court room sitting down in a seat.' And from arrest until sentenced to death, petitioners were never—either in jail or in court—wholly removed from the constant observation, influence, custody and control of those whose persistent pressure brought about the sunrise confessions."

In passing upon the issue of whether the proceedings afforded the safeguard guaranteed by the Fourteenth Amendment, this Court pointed out specifically that there were certain "undisputed" facts, certain "admitted practices" and certain matters shown "without conflict," and we direct the attention of this Honorable Court particularly to that circumstance as being important in consideration of the instant case.

We quote from the opinion in *Chambers* vs. *State of Florida*, as follows:

> "Here, the record develops a sharp conflict upon the issue of physical violence and mistreatment, but shows, without conflict, the drag net methods of arrest on suspicion without warrant, and the protracted questioning and cross questioning of these ignorant young colored tenant farmers by State officers and other white citizens, in a fourth floor jail room, where as prisoners they were without friends, advisers or counselors, and under circumstances calculated to break the strongest nerves and the stoutest resistance. Just as our decision in *Brown* v. *State of Mississippi* was based upon the fact that the confessions were the result of compulsion, so in the present case, the admitted practices were such as to justify the statement that 'the undisputed facts showed that compulsion was applied'."

The case of *White* vs. *State of Texas*, 310 U. S. 530, 84 L. Ed. 1342, is cited by petitioner.

The facts in this case are that defendant, an illiterate farm hand (apparently a Negro) was held in jail for several days without charges being filed against him. He was without legal counsel and out of touch with friends or relatives; on several nights during this period he was taken handcuffed by armed guards out of the jail and into the woods for interrogation; while in jail the sheriff put defendant by himself and kept constantly watching and talking to him; a confession was obtained

after this process by an interrogation of the county attorney from 11.00 p.m., to 3.30 a.m., during which period the officers who had been out to the woods with the defendant were in and out of the room. The defendant claimed that while out in the woods he was whipped and a confession was demanded of him and that he was warned not to tell that he had been out in the woods. This statement of the defendant was controverted by the officers who, however, did not controvert the other matters above referred to. The state's case against the defendant rested substantially upon the confession thus obtained.

This Honorable Court cited and quoted from the case of *Chambers* vs. *State of Florida, supra.*

Certain obvious distinctions between the facts in the case of *White* vs. *Texas*, and those in the instant case are obvious. The petitioner in this case is not an illiterate farm hand, but, on the contrary, the owner of a barber business, the employer of several barbers, and a man who for a long period had dealt with insurance agents, and whose language as shown by his confessions and by his testimony was responsive, lucid and intelligent. Nothing happened to him comparable to the systematic taking of the defendant out into the woods in the middle of the night as testified in the *White* case, nor was he, as in that case, deprived of counsel. Moreover, when he did confess he did so as a result of a voluntary determination on his own part and made the

confession, in the first instance, to individuals who are not asserted to have participated in any manner in the prior questioning of petitioner.

The foregoing are four of the decisions of this learned Court which apply and establish a rule which we believe may be stated, as indicated by those cases, as follows:

Where a conviction rests solely or principally upon a confession or confessions, and where it appears without conflict that such confession or confessions were obtained by any means amounting to compulsion, the rights of the individual convicted by the use of such confession or confessions, under the due process clause of the Fourteenth Amendment of the Constitution of the United States, have been violated and this Court will, in an appropriate proceeding brought for that purpose, set aside such conviction and any judgment resulting therefrom.

The foregoing statement includes, as we construe the authorities, the following elements:

(1) The confession must have been obtained by compulsion.

(2) The fact of such compulsion must be shown by undisputed or uncontradicted evidence.

(3) The confession must be the sole or at least a principal part of the evidence upon which the conviction rests.

Stating the rule conversely, if our analysis of those decisions is correct, this Honorable Court will not interfere with the judgment of conviction where

the confession is procured under such circumstances that it is not clear that it was obtained by compulsion, or where there is a conflict on that question as a result of which conflict the trial court in the first instance would be justified in holding either that there was or was not compulsion, or where it appears that the conviction of the accused is supported by substantial evidence independent of the confession.

Our conclusion, with reference to the matter of the rule where a conflict in the evidence appears, is supported by several decisions to which we direct the attention of this Honorable Court. Preliminarily, it may be said that the three cases heretofore cited appear to recognize the rule to be that where there is a conflict of evidence as to whether the confession is or is not voluntary, and the trial court determines that it is voluntary, the decision of the trial court on all points as to which there is a conflict will not be disturbed by an Appellate Court. This is suggested by the stress that is laid in those three cases in pointing out that the evidence was "without conflict" or "undisputed" or "conclusive" or "admitted."

In *McAfee* vs. *United States*, 70 App. D. C. 142, 105 F. (2d) 21, 24, it is said:

> "Under the law and practice in this jurisdiction, the duty of a trial judge in respect of an offered confession is first on voir dire to determine whether or not there is evidence upon

which the confession might be held to be voluntary. If he concludes there is no such evidence, then he must exclude the confession from the case. But if, in his view, there is evidence from which it might be held to be voluntary, he must admit it in evidence and submit it to the jury under proper instructions."

In *Wilson* vs. *United States*, 162 U. S. 613, 16 S. Ct. 895 (quoting from page 624 U. S. Reports), it is said by this Honorable Court:

"When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant."

See, also, *State* vs. *Strable*, 293 N. W. 441, and *People* vs. *Lehew*, 209 Cal. 336, 287 Pac. 337.

The facts stated in petitioner's brief with reference to the circumstances of his arrest, detention and confession are in many important particulars not supported by the record, and in other important details are contrary to the record. In numerous instances petitioner in his brief refers, as supporting statements of fact, to the dissenting opinion of the Supreme Court of California and not to the evidence adduced at the trial. In some instances a fact is stated to be as testified by petitioner, himself, although the record shows that his statement in that respect was controverted.

For instance, he states that petitioner was taken into custody and removed from his house without any warrant or other legal process and without any reasonable or probable cause at the time. The fact is that he was arrested while actually engaged in the presence of officers in committing the crime of incest. (R. 456, 458, 463.) Under California law a peace officer is authorized to make the arrest for a public offense committed in his presence. (California Penal Code Section 836.)

The brief states: "He was taken to the county jail and placed in a private tank known as the 'High Power Tank' without any charge being preferred against him, where he was kept under constant surveillance and never allowed to be alone, even in jail."

The record shows that upon being placed in jail he was "booked" on the charge of incest. (R. 464, 578.) On the same day he was arraigned in court on this charge (R. 483); there is no evidence that he was placed in a "private" tank. There is no evidence that he was "kept under constant surveillance and never allowed to be alone, even in jail." On the contrary, it appears that his own attorney saw him several times during the period that he was in jail. (R. 481-484.)

The brief states: "He was continuously questioned while he was in jail and was repeatedly removed from jail at all hours of the day and night for questioning."

The record shows no single instance of petitioner's being questioned while he was in jail, except the one time on the morning of May 2d when he was confronted by his accomplice, Hope, and accused of complicity in the murder of his wife (R. 616-618); and the record shows no single instance of his being removed from jail, except the one time on May 2d when he was taken out of jail by a duly authorized deputy sheriff for questioning by the district attorney. (R. 618-619.)

The brief states: "He was at all times denied the right to the consultation with an attorney for days, until he was lodged in the county jail, at which time he was permitted to see an attorney on one occasion."

The facts as shown by the record are: (1) that he saw and consulted with his attorney the day after his arrest and the day before he was "booked" in the county jail (R. 571, 483); and (2) that he was accompanied by his attorney at the time of his arraignment on the incest charge and saw him in jail a number of times thereafter between that date and the date of his indictment for murder. (R. 483, 481, 482.)

(See, also, our argument under Point V.)

Too much of the time of this Honorable Court would be consumed by detailed analysis of the numerous misstatements of fact contained in petitioner's brief. However, we herein set forth in detail the true facts as shown by the record, with

careful citation of the record, and ask that the court consider the statements of fact set forth in this brief and sustained in every instance by the record. Such examination will demonstrate that the comparison in petitioner's brief of the purported facts of the instant case with the facts of the cases of *Chambers* vs. *State of Florida*, *White* vs. *State of Texas*, and *Brown* vs. *State of Mississippi*, *supra*, is invalid because petitioner's claims as to the purported facts in the instant case are not supported by the record.

(See our "Discussion of evidence adduced on voir dire examination," infra.)

2. Voir Dire Examination

It was the contention of respondent at the trial and still is that petitioner was not subjected to brutality or inhuman treatment, to force or violence, to threats or any other compulsion, and that he did not make the confessions introduced in evidence at the trial because of any one or more of such matters. He testified, it is true, that he was beaten, that he was threatened, that he was frightened, that he was questioned until he fainted, and that he confessed because of fear of a recurrence of such beatings. That was his story. The evidence produced by respondent, however, overwhelmingly refuted this contention, not only by express and direct testimony of witnesses, but by numerous circumstances which tended to discredit the testimony

of the petitioner and which impeached his veracity generally.

The trial court, in order to determine in the first instance, as a matter of law, whether the confessions proposed to be offered in evidence by respondent were voluntary, permitted evidence to be adduced on voir dire examination. This voir dire examination involved the testimony of many witnesses called by both petitioner and respondent and consumed a number of days of the trial. At the conclusion of the presentation of all evidence offered by the respective parties on this issue, the trial judge held the confessions to be admissible, adopting the theory, which is the law in the State of California as well as in the Federal Courts, that where there is substantial evidence which would warrant the conclusion that the confessions were voluntary, even though there be a conflict, the confessions will be admitted in evidence, and the jury will be properly instructed that if they believe the confessions to have been obtained voluntarily they may consider the same, but if they are of the opinion that they were not voluntary they should be rejected. Such instructions were given in the instant case as offered by petitioner. (R. 1119-1122.)

A. DISCUSSION OF THE EVIDENCE ADDUCED ON VOIR DIRE EXAMINATION

A-1. Petitioner's Evidence

We now purpose to discuss in some detail the evidence bearing upon the question of whether the confessions were voluntary or involuntary. The petitioner testified that he received a long, terrific beating at the hands of detectives Southard and Griffen; that it was inflicted during the night of April 20th and resulted in his receiving a hernia; that he was rendered "black and blue from my waist up"; that as a result of which "both of my ears were swollen so that I couldn't hear" (R. 485, 492, 494); that on the nineteenth of April he was threatened by Southard and Griffen; that they "had known about my killing my wife and I had just as well confess it to them or they were going to beat the hell out of me (R. 489); that at about three or four o'clock in the morning on the night between Sunday and Monday (April 19th and 20th) Williams, the deputy district attorney in charge of the investigation, told him he had authority to give him a lighter sentence if he would come clean; that if he would tell the truth he would get a light sentence, maybe get off with manslaughter; that he was questioned long hours through Sunday and Monday, including Sunday night and Monday night without sleep, as a result of which he "fainted or passed out" (R. 493); that on April 19th he asked for his counsel, Mr. Silverman, and was informed

that Silverman was out of town, and that he then asked for a Mr. Parsons and was informed that Parsons said he didn't know anything about the case and it would take too long to look over the transcript and he couldn't see him. (R. 487, 488.)

Petitioner testified that he was placed in the county jail on April 21st and remained there, except during the time he was before the Court and the grand jury, until the second of May (R. 493, 494); that on the second of May he was taken to the chaplain's room of the jail and at that time he was still suffering pain from the injuries he had received and had a memory of the physical force that had been used upon him; that when there confronted by his accomplice Hope and accused of the commission of the crime by Williams, he was afraid to deny it. (R. 494, 495.) He testified that shortly after noon on May 2d he was taken to the district attorney's office by deputy sheriff Gray; that Southard was there; that at about ten o'clock that night the room was cleared of all except Southard who then told him that he, petitioner, had been lying to Fitts (the district attorney) all evening and that "you are going to tell the truth here and now or I am going to take you back to that house and I am going to beat your God Damn head off" (R. 496, 497) to which petitioner, according to his statement, responded that he was ill from the beating he had taken before and couldn't stand another beating and that he would gladly admit what

Southard was relating to him about his accomplice's story and save himself from further punishment. (R. 497.)

The foregoing is the substance of the testimony of petitioner on voir dire concerning the threats, promises and brutality claimed to have been suffered by him. In order that his testimony may appear intelligible it should be remembered that the events which led up to his confession were chronologically as follows:

A-2. Chronological Order of Events

Shortly after nine o'clock on the morning of April 19, 1936, petitioner was arrested while in bed with his niece, charged with the crime of incest. He was taken to the house next door to the place of his arrest where the officers had the receiving portion of a dictograph installed and shown the dictograph, after which he was questioned for a short time (R. 457, 458, 560), then taken to the district attorney's office where he was questioned by Buron Fitts, the district attorney, and others for several hours. (R. 465, 560.) He was then in the late afternoon of April 19th (which was a Sunday) taken back to the house adjacent to his own home, where the dictograph was installed. (R. 470, 560.) He was kept there Sunday night, part of Monday, was taken out to view a house which he pointed out to the officers (R. 559, 568), was taken to the district attorney's office, was returned to the

original premises, there kept Monday night, and Tuesday morning he was taken to the district attorney's office and then booked in the county jail charged with the crime of incest. (R. 457, 458.) This was April 21st. On the same day he was arraigned in court and returned to the jail. There he remained until Saturday, May 2, 1936 (R. 493), when he was confronted by his accomplice Hope and accused of the murder of his wife. (R. 617, 630.) Later that day he was taken from jail by deputy sheriffs, taken to the scene of the murder of his wife, there questioned, and later returned to the district attorney's office, at about three or four o'clock in the afternoon of Saturday, May 2d. (R. 618, 619, 624.) He remained in the district attorney's office until about midnight of May 2d, when he was taken to a restaurant several blocks away by officers, at which time he ate a meal, following which, and at the restaurant, he made a statement to the officers in which he admitted complicity in the killing of his wife. Thereafter, he was taken to the district attorney's office at which place he arrived at about 1.30 a.m., May 3, 1936, and, in answer to questions by District Attorney Fitts and others, made a statement, taken stenographically, in which he again admitted participation in the killing of his wife. (R. 619, 620; 632-639; 640-660.)

A-3. Facts Adduced on Cross-Examination of Petitioner

It should be noted that the only brutality or force or violence claimed by petitioner to have been inflicted upon him was inflicted at the time of his arrest between April 19th and 21st; that no confession was made by him during that period; that thereafter he was in the county jail in the custody of the sheriff and not of the district attorney, for eleven days during which time he appeared in court, as will be hereinafter brought out, and several times saw his attorney, and that the only complaint he makes of his treatment from the time he was taken out of jail on May 2d until he confessed on May 3d was that Southard threatened that unless he did confess, the beating which he claimed to have received on April 20th would be repeated.

On cross-examination, following his direct voir dire examination, above referred to, certain significant matters were brought out. First, petitioner stated that he did not admit any crime to Southard and Griffen following the beating he claimed to have received at their hands. (R. 497, 498.) Next, he admitted that prior to his appearance in the chaplain's room on the morning of May 2, 1936, at which time he was accused of the crime of killing his wife and failed to deny such accusation, he was not told that he was going to be beaten, nor was he threatened in any way nor was he offered anything. (R. 498.) He admitted that at the time he confessed to

District Attorney Fitts on the morning of May 3d he said, "There ain't enough men in the district attorney's office to make me talk. And there wasn't; if he (meaning Hope, his accomplice) hadn't told it you never would have got me to talk." (R. 501.)

He admitted that at the time of the conversation on the night of April 19th in which he claimed that Williams had offered him life imprisonment or perhaps manslaughter and had stated he was authorized to make such offer, a detective named Davis may have been present, that the first thing Williams said to him was that he was the deputy district attorney in charge of this case and wanted him, petitioner, to know that he was not in a position to make any promises or offers of any kind or character to him, and that any statement made by him to said Williams would have to be freely made. (R. 503, 504.)

He admitted that on the night of May 2d, while in the district attorney's office and before making any confession, at about 6 o'clock, he drank some coffee and wasn't sure whether he ate sandwiches or not. (R. 506.) He admitted that he went to dinner with deputies sheriff Killion and Gray and there made a statement to them, and admitted that he made a statement to District Attorney Fitts thereafter in the presence of Gray and Griffen, Southard and Mrs. Dorothy Adams of the district attorney's office. (R. 507.) He admitted that no threats or offers of reward were made to him at the

time he was in the presence of Mr. Fitts. (R. 505.) He also stated that neither Killion nor Fitts nor Gray ever laid a hand on him or threatened him in any way or offered him anything. (R. 507.)

A-4. Facts Adduced by People's Witnesses Relative to Use of Violence

As opposed to the petitioner's claims of violence, threats and coercion, and in corroboration of his admissions on cross-examinations, many witnesses testified. Southard stated that he did not use any physical force upon petitioner other than to slap him once on April 20th (R. 464), and that the slapping was a result of the following circumstance as to which Southard testified:

> "I told Mr. James, 'It is a dirty shame, such a beautiful little girl and so well brought up and so well thought of by everyone, had to die in a fishpond, be drowned and then put there.'
>
> "And then James said, 'Aw, leave me alone and quit questioning me about her. She wasn't so much before I married her; she was only a little whore when I married her'; and I lost my temper and slapped him." (R. 477.)

Southard further testified that not only was that the only time he used any force or violence upon James, but he said that not to his knowledge did any other person use any force or violence on him. He further testified that at the time he had petitioner in custody during the month of April and after he had slapped him in the face, petitioner did

not make any statement with reference to whether he had or had not killed or attacked or injured his wife. (R. 478, 479.)

The witness Griffen (accused of being the other person who participated in the beating) testified that Southard slapped the petitioner in the face on the early morning of April 20th, his version being:

> "Mr. James said, 'She was not very much.' He said, 'She was a whore when I married her.' At that time Jack was sitting in a chair just opposite his chair and he reached over and slapped him, and I said, 'Take it easy, Jack.'"

He also testified that there was no other force or violence of any kind or character used upon petitioner during the time he was in his company, either before or after this incident. (R. 556.) The witness Dean testified to the same effect. (R. 601.)

The witness Martin (A District Attorney's detective) was with the petitioner the night of April 19th until 4.30 Monday morning and was again with him Monday afternoon and Monday evening until 9 or 9.30 o'clock; that no force or violence or offers or promises of immunity or reward were used in his presence; that the petitioner appeared cool and calm and not frightened; that petitioner told him on Monday evening that Southard had slapped him, but made no other complaint, and that at the time petitioner told of Southard's slap, petitioner did not appear to be frightened and his answers to questions were coherent and responsive. (R. 602, 603.)

The witness Robert P. Stewart, chief deputy district attorney of Los Angeles County, testified that during the 2d and 3d of May there was a conversation with respect to physical violence having been used upon petitioner. This conversation took place in the presence of Stewart, who testified as follows:

> "Mr. Fitts asked Mr. James how he had been treated by the boys. Mr. James said Jack Southard had slapped him. Mr. Fitts asked him what he had done. He said 'Nothing.' Fitts turned to me and said, 'Will you look into it.' I said I would, and I did."

Stewart testified that that was all he heard petitioner say with reference to any force or violence having been used upon him. (R. 594.)

On the question of the hernia which petitioner claims to have suffered as a result of his beating, Doctor George who examined him during the course of the trial testified he discovered a hernia which he had not seen when he made a less careful examination of the petitioner a number of months before, and that he had no idea how long that hernia had been in existence. (R. 462.) The witness Martin, however, testified that on the night of April 20th (before petitioner claims to have been beaten) petitioner told a Mr. Cavett in the presence of Martin that he had received a hernia at the time of an automobile accident in Colorado when the car went over the bank and he went down about fifty feet and fell out of the car. (R. 603.)

It will be remembered that James testified that he was so badly beaten on April 20th by Southard and Griffen that he was black and blue from the waist up and his ears so swollen that he couldn't hear. On the morning of April 21st, the next day, petitioner was booked in the county jail. At that time his clothes were taken from him, and he was given a bath and his body was examined while he was undressed by Deputy Sheriff Jack Williams, employed in the county jail, who testified it was a part of his duty to observe and make a note as to whether there were bruises or cuts or abrasions upon a prisoner when he came in; that such record is put on a log. He said he did not observe any black and blue spots any place on the body of petitioner or any cuts or abrasions and made a note of none and reported none. (R. 578, 579.)

The witness Phillips, another deputy sheriff employed in the jail, stated that he observed the petitioner with his clothes on at the time he was booked on April 21st; that it was a part of his duty in the jail to observe such matters when a man is booked because if there are any bruises the prisoner is sent to the hospital directly and a memorandum of such bruises is made. He said he observed no marks or bruises or discolorations upon the face or head of petitioner and made no memorandum of such because there "was not any to make notes of." (R. 579-581.)

The witness Peoples, deputy sheriff and chief jailor of Los Angeles County, testified that he talked to petitioner within two or three days after his admission to jail and that he observed no marks, bruises, scratches or mars upon that portion of petitioner which he could see, which was his face and hands, and that petitioner made no complaints to him of mistreatment. (R. 594, 595.)

A-5. Facts Adduced as to Any Offered Inducement

Despite the fact that petitioner claimed to have been offered life imprisonment or even manslaughter by Deputy District Attorney Williams if he would confess during the conversation of the night of April 20, 1936, on cross-examination by Williams, petitioner testified as follows:

> "Q. And the first thing you said or rather the first thing that I said was that I was the Deputy District Attorney in charge of this case and I wanted you to know that I was not in a position to make any promises or offers of any kind or character to you and that any statement you made to me would have to be freely made by you?
>
> A. That is what you said." (R. 504.)

The witness Davis testified that he was with the petitioner before, during and after the only conversation claimed to have been had with Deputy District Attorney Williams at the La Salle Street

house following the arrest. Davis' testimony respecting this matter is as follows:

(Questions by Williams)

"Q. Yes Now, during the time that I was talking with the defendant, did I say to him in substance or effect that I had authority to promise him that if he made a confession he would not receive the death penalty, but would receive life imprisonment?

A. There never was any such statement made.

Q. And did I say to him in substance and effect that if his crime was not too heavy I might be able to get manslaughter for him?

A. You did not.

Q. Do you remember what I did say on the subject of authority?

A. Well, I recall specifically that you told the defendant that no one in connection with this case had any authority to promise him anything, that we were particularly interested in the death of his wife, and that if he had any story to tell us, we would be willing to listen to it." (R. 581, 582.)

A-6. Facts Adduced Relative to Petitioner Being Deprived of Sleep

Despite petitioner's claim that he was questioned without sleep during the period from April 19th to 21st, it appears from the testimony of the witness Davis that petitioner did sleep from about three-thirty or a quarter of four in the morning of

the 21st until eight o'clock a.m., at which time petitioner had hot coffee in the kitchen; that thereafter petitioner went to a cafe near Ninth and Alvarado where the petitioner ate breakfast. (R. 583.) The witness Dean testified that petitioner slept Monday night. (R. 600.) The witness Griffin also testified that petitioner had a cup of coffee on the morning of the 21st and that he, Griffin, asked the petitioner if he wanted to eat and petitioner said he did; that Griffin "told the boys to take him out to eat." (R. 573.)

The witness Southard testified that during the period of time from April 19th to April 21st, petitioner was taken out for meals every time it came mealtime. (R. 471, 472.)

It therefore appears that there was evidence that the petitioner did have sleep and also ample evidence to the effect that he had his meals regularly during the period immediately following his arrest and before he was booked in the county jail.

A-7. Facts Adduced Relative to Petitioner's Right to Counsel

The circumstances with reference to petitioner asking for counsel was testified to by several witnesses. The witness Southard testified that when petitioner was first in the district attorney's office, April 19th, he asked Mr. Fitts to get in touch with Mr. Silverman and "Mr. Fitts offered to get in touch with him and was unable to locate him," and

that he (witness) did not hear James thereafter express a desire to be represented by counsel. (R. 466.)

The witness Griffin testified that petitioner had a conversation with his attorney, Mr. Silverman, at the district attorney's office on Monday (April 20th). (R. 571.)

Mr. Silverman was called as a witness by petitioner and testified on direct examination that he did not see petitioner on April 21st but did see him on or about April 25th and on several days later. (R. 481.) On cross examination, Mr. Silverman admitted having appeared in the superior court at the time petitioner was arraigned on April 21st (R. 482, 483), and when further questioned as to when he had first seen petitioner after petitioner was arrested on the morals charge stated, "I don't know what date that was, Mr. Williams." (R. 484.)

The witness Killion testified that on one occasion petitioner asked if he couldn't have a chance to ask his attorney whether he should answer questions or not and was told that "we were attempting to get in touch with Mr. Silverman."

It was ascertained that Silverman was at Murrieta Hot Springs; that Mr. Fitts so informed petitioner; that petitioner then asked for Mr. Parsons. (R. 625, 626.)

Mr. Killion further testified that an effort was made to get in touch with Mr. Parsons but that

they were not able to. (R. 628.) Thereafter he testified as follows:

> "Q. Now, thereafter did Mr. James say anything that he didn't want to proceed without an attorney being present?
>
> * * * * *
>
> A. No, sir, he didn't say that.
>
> Q. By Mr. Williams: Did he thereafter ask for another attorney?
>
> A. No, sir." (R. 628.)

On the morning of April 21, 1936, petitioner was lodged in the county jail of Los Angeles County where he remained in custody of the sheriff of Los Angeles County until the morning of May 2, 1936. At the trial he made no complaint of receiving any mistreatment during that period of time. As already pointed out, he conferred with counsel on April 20th, he was accompanied at his arraignment on April 21st by counsel of his own choosing, and that counsel had at least one conference with him on April 25th, and saw him on several days thereafter until about a week later while petitioner was in jail. (R. 481-482.)

A-8. Events on May 2d

On the morning of May 2d, at which time petitioner says he still had a memory of having been beaten in April and feared another beating and was afraid to talk, he was taken by Deputy Sheriff Killion, whom he met in the attorney's room on the 10th floor of the Hall of Justice within the jail,

down a corridor along a cell block to a room known as the chaplain's room, same building, same floor. The only conversation had between James and Killion was that Killion said "Hello, James," or "Hello, Bob," and no other persons had any conversation with him. When he reached the chaplain's room, there were present in addition to James and Killion, Deputy Sheriff Gray, and also Lynch, a statement report of the sheriff's office, Griffen and Southard. Nothing was said. Hope was then brought into the room, at which time the first word said by anyone was by Deputy District Attorney Williams. Killion further testified that there was no force or violence used upon petitioner by anyone; that there were no offers or promises or hope of immunity or reward extended to petitioner; that no threats were made; that all statements made by petitioner were freely and voluntarily made; and that immediately following the statements, hereinafter set forth, petitioner was returned to the attorney's room by Killion. (R. 616-618.)

(2) Accusatory Statement

The statement made by Deputy District Attorney Williams to petitioner at that time was in the nature of an accusatory statement. Said statement and petitioner's responses thereto are as follows: (R. 630, 631.)

"'By Mr. Williams: Q. James, do you knew this man Chuck Hope?

A. Yes, I know him.

Q. Now, Chuck Hope told us this morning that on the 4th day of August, the day before your wife was killed, he came out to your house; that on the day before that, at your request, he had purchased and delivered to you three rattlesnakes; that he came to your house between 11 and 12 o'clock on the Sunday, the 4th of August; at that time, he went into the house, and you had your wife in the breakfast nook strapped or tied on the table with her mouth bound with adhesive tape and adhesive tape over her eyes; that he brought the rattlesnakes in and you put her left foot into the box of snakes with your hand and one of the rattlesnakes bit her.

"'After that, he went away with your automobile and took the snakes and returned them to Snake Joe in Pasadena where he had gotten them. He came back about 1 o'clock Monday morning, that same night but after 12 o'clock, and at that time, he met you out in the garage, and you told him out there that your wife was not yet dead.

"'He said that you had some drinks; that you left him; at 4 o'clock you came out and said—no, that is not correct—at 1 o'clock you told him you were going to drown her in the bath tub. At 4 o'clock you came out and told him that she was dead. Then you went back into the house and about 6 o'clock or 6:30 you came into the garage again and told him she was dead, that you had the mess all cleaned up and for him to come in and help you carry her out.

"'He went into the house. She was lying in the hallway between the bathroom and kitchen door. You picked up the head portion of her

body. He picked up the feet or legs. You carried her out to the fish pond, right alongside of the fish pond and he laid her down alongside the fish pond. She was dead at that time.

"'He left and went and got into the automobile. You stayed and put her body into the fish pond and then came out and got in the automobile. In the meantime, you had taken a lot of wet clothing and towels and put them in a bucket in the back of the automobile.

"'You went down to his apartment where he was living near Virgil Street, and he took this clothing and told you he would get rid of it. That included several blankets, some towels, a sweater and other clothing, and he did get rid of it.

"'He makes that statement. Have you got anything to add to it?

By Mr. James: A. Nothing.

Q. Nothing—that is all.'" (R. 630, 631.)

It will be noted that, prior to the making of this accusatory statement and the petitioner's failure to deny it, no word was said or deed done from which petitioner or any other person could have properly believed that in the county jail in the presence of a shorthand reporter and in the custody of the deputies sheriff, any person present intended to or would use any force or violence or threats upon him. No force was used; no threats were made; no promises were extended, and yet when confronted by his accomplice and told briefly of the matters of which he stood accused by his accomplice, he failed to deny that accusation.

(b) Law of California Relative to One's Failure to Reply to Accusatory Statement

Under the law of California, when a person, under conditions which fairly afford him an opportunity to reply, stands mute in face of accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt. (*People* vs. *Lapara*, 181 Cal. 66, 71.) The question of whether the circumstances were such as to fairly afford an opporunity to reply is left to the determination of the jury under appropriate instructions. Such instructions were given in the instant case. The jury under the evidence were justified in believing that petitioner was afforded an opportunity to reply and failed to do so and that such failure indicated his admission of guilt, i.e., participation in the crime of killing his wife as charged in the accusatory statement.

In the afternoon of the same day, (May 2d) the petitioner was taken by Deputies Sheriff Killion and Gray, pursuant to a court order, out of the county jail to La Canada, the scene of the death of Mary James, and back to the Hall of Justice and to the district attorney's office, where they arrived sometime in the middle afternoon. (R. 618, 619.) Petitioner, at the trial, made no complaint regarding this visit to the scene of the crime nor of receiving any mistreatment or of being threatened in any manner to make any statement relative to the death of his wife.

Killion testified that he remained in the company of petitioner at all times from the time petitioner was taken from the county jail, pursuant to a court order, until petitioner was returned to the county jail early the following morning; that during the course of the evening, petitioner requested to be taken to dinner; that petitioner's request was granted; that they, in company with Gray and Investigator Davis and a young lady by the name of Carmen Wastengs, went to a restaurant at Fifth and Figueroa streets, which is eight or nine blocks from the district attorney's office, where petitioner had dinner; that after dinner, he (Killion) had a conversation, hereinafter set forth, with petitioner following which petitioner was taken to the district attorney's office, where they arrived about one or one-thirty in the morning and a statement at that time was taken from petitioner which was finished at about three o'clock in the morning, after which petitioner was returned to the county jail. Killion testified that during the entire time he was in the company of petitioner that day, petitioner did not give the appearance of being afraid; that petitioner was cool, collected and seemed to show no emotion of any kind; that petitioner's answers to questions were responsive; that petitioner appeared to be rational and coherent; that no force or violence was used upon him, no threats were made, no offers or promises or hopes extended of immunity or reward, and that all statements made by peti-

tioner during that period were made freely and voluntarily. (R. 619-621.)

A-9. Events of May 3d

(a) Informal confession by petitioner

The conversation, which took place at the restaurant sometime between midnight and one or one-thirty on the morning of May 3d, was related by the witness Killion as follows: (R. 633-639.)

> "A short time before midnight, in the office next to the District Attorney's office, James said to me, in the presence of Mr. Gray, 'Why don't we go out and get something to eat, and I will tell you the story.' I said, 'All right.' Thereafter the persons mentioned went in my automobile to the restaurant at 5th and Figueroa, and upon being seated, I said to Mr. James, 'Well, do you want to tell us the story now?', and he said, 'No, let's have something to eat, first.' So we ordered a dinner. As I remember, we had a steak dinner. After the dinner was finished we bought cigars. Mr. James had a cigar, and he said, 'Now, you want to have this story?', and I said, 'Yes.' So, he said, 'All right; there is no hurry, is there?' I asked him if he wanted to go back to the office to tell the story, and he said, 'No, this is all right, isn't it?' I said, 'Sure, it is all right.' So he said that about July 4th of this year—of 1935, I mean, was when Mary, his wife, had gone to Long Beach. He said that Charles Hope came to his, James', house, in La Canada, and at that time his, James', sister, Mrs. Murphy, was living

there. James said that when Hope came he remembered the occasion, because of his having some game chickens, and Mrs. Murphy, his sister, was helping him with them in the garage. James said that Hope had no money, and no place to stay, and wanted to stay there. He said that Hope told him he had left his car down on Verdugo Road, and Mr. James said he noticed that Hope was drinking, in fact, he thought he was drunk, and that he didn't want Hope to stay there. He said that when Hope asked him if he could stay there all night, that since he didn't want him to stay, being drunk, he gave him a dollar to pay for a room in which Hope could sleep. Mr. James said that Hope came the next night about suppertime, and at that time he gave Mr. Hope a key to the place, and showed him the sun parlor as being the place where he could sleep, and that Hope stayed there on a Tuesday night. He placed the Tuesday night as being that of the Tuesday night after Mary had gone to the Dental Convention in Long Beach. He didn't know the exact date.

"James said the next Thursday after that Tuesday, he was alone and about 2 o'clock—I mean he was alone at the Italian Village at Los Angeles, and he got drunk there and he met Madge Reed——

* * * * * *

"He said that he met Madge Reed and a blonde beauty operator at that place, and that after spending some time with them, they drove his car home, and that some place along the way, he doesn't know where, the blonde went

away, that is she was not in the car anymore, and that he lost his memory then and didn't remember anything more until about midnight when his, James' wife, awakened him by bathing his face with a wet cloth. He said his wife laughed and said, 'Who was the woman that was here?' And he said he didn't remember. He said that his wife went back to Long Beach on Friday morning and that on Saturday, after that Friday, Madge Reed, came by his barber shop on 8th Street and she said to him, 'You owe me three dollars. I spent that for cab fare and lunch', and that he gave her five dollars at that time and that he never saw her again until after Mary's death.

"He said that Mary came from Long Beach on a Saturday and when she came she was sick, and on the Sunday following that Saturday his sister, Mrs. Murphy, was going back east and that he took her to the train on Sunday night. On Monday, following the day that Mrs. Murphy went east, that Mary was still sick and he took her to a Doctor George for examination. He said that they went to Santa Ana to get a marriage license and did get a license and were married on July 19th, and that after the time of their marriage on July 19th, that Mary was sick all the rest of the time of her life.

"He said that he and Hope had talked about the insurance on Mary's life. He said that Hope knew she had the insurance because he, James had told him that she had $5,000.00 insurance. He said that he and Hope drank together on many occasions. He said one thing Hope said, 'Why don't you bump her off and get some

money?' He said that Hope said, 'Let me do it.' He said that Hope would get drunk with him on many occasions, and each time they got drunk that they would talk about the insurance and about doing away with Mary. He said on one occasion, he and Hope discussed some way to get rid of her and Hope said, 'Drive her out in a car and I will hold her up and shoot her', and Hope said, 'There are many other ways.' He said that about that time, Hope brought some stuff in some sacks. He thought it was rattlesnake poisoning in a powder form and that Hope thought it was deadly. At that time they got drunk again and nothing definite was decided upon. That Hope continued to see him, and that Hope told him and Mary that he, Hope, was a medical student, and that Mary wished to have an operation performed, that she didn't want to become a mother, and they talked it over in her presence and she had been learning that, she told him, it seems, that she wanted Hope to do something to her to cause her to have a miscarriage.

"About that time, James says he didn't remember the date, but he said that Hope was away for about a week and he came back and said, 'Well, Mary was dying anyway. She is sick. Why don't you kill her and let us get the insurance?' And then he said that Hope sprang the rattlesnakes on him and told him about getting snakes. He said, 'I will go out and get a rattlesnake that will kill her quick.' He said on that occasion that they would get drunk again Hope said, 'I will go and get a snake.'

"He said it was arranged and he gave him $20.00 and that Hope came back with two boxes,

two snakes in one box and one in another. They put the snakes in the chicken house and locked the chicken house. He said, 'It must have been dog days, because those snakes wouldn't bite anything.'

"Then Hope got two snakes, he thought, in Venice, and at the time he got them he got a white rabbit and put the rabbit in the box with the snakes, and left that night—the night that they put the rabbit in the box with the snakes, Hope left the girl back to his hotel. He said he didn't know whether it was his girl or wife. In the morning, when he, James, looked at the rabbit and the snakes the rabbit was dead.

"He realized he was doing the wrong thing and he said to Hope, 'We are both nuts.' Hope said he had to have some money. He said to James, 'You have a job and I have nothing and we have gone so far now that we cannot quit. We have already committed a crime now with the thing we have done.' He said, 'You get a spider and try that,' and he brought some spiders and when Hope brought them, that James threw them out and that there was nothing done with them.

"A day or so after the spiders had been brought, Hope said he had found a place where he could get a real snake and Hope said to James, 'Let me take your car in the morning and I can get them.'

"He said Hope took the car and went to some place in Pasadena and brought them to the barber shop and they went home together on Saturday night.

"They took the snakes from James' car and put them in Hope's car and drove to El Canada and then they got drunk. And that was on Saturday night. He said that Hope and Mary talked about an operation, Saturday night, after they became drunk, Hope left.

"He, James, and Mary continued to drink on Saturday night, and Hope came on Saturday morning, and he was half tight, James said, and they got some more to drink, and got her tight. Hope said he was going to do the work, and James said that about 1:00 o'clock in the afternoon on Sunday, that he, James, took his automobile and drove away, after Hope had told him he was going to do the work. James said that he didn't know anything about any tape being used on Mary, but that he did know that Hope was going to kill Mary with the snakes within an hour. He said that he left at about 1:00 o'clock, and came back about 3:00. He said that Mary was apparently pretty sick, and she didn't know what had happened, but she was in bed very drunk. He said that when he spoke to her, she said that she was very sick, but she guessed she would be all right tomorrow, and she kept calling for him, for James.

"He said that he had Mary write the letter that had been—that was found on the table, the letter in the envelope addressed to Mary's sister in Nevada. He said that Hope then took the automobile and left, and James continued to drink all Sunday, and that Hope came back about 6:00 o'clock Monday morning and asked if Mary was dead, and James said, 'No, she is all right,' and Hope asked, 'Did the snake bite her?', and James

said, he didn't know. James said, 'She is all right.'

"And Hope looked at her leg, which was black, and he told James that he turned the snakes out, and he said, 'What will we do?' James said, 'I am going to get drunk.'

"Hope told James to go ahead, and he would finish the job, and he said, 'How are you going to do it?' 'I will set the house on fire, and in that way we can get everything.' He said, 'We cannot quite now. They will know about the snakes.' He said that Hope told him to go on to work, and that he was going to finish the work there. He said he got in his car and started to work, and he felt like taking a drive, and after he drove out on Wilshire Boulevard he then drove to his shop. He said that Hope came into his shop between 12:00 and 1:00 o'clock on Monday, and they went to Melody Lane for lunch. There Hope said to him, 'Well, I got rid of her.' James said, 'You burned the house?', and Hope said, 'No, I drowned her in the bath tub.' And James said, 'Well, you are the craziest son-of-a-bitch I ever saw.' He said they had a big argument there, and he told Hope, 'Don't you know they will throw me in jail tonight?' He said, 'I had a wife drown in Colorado in the bath tub, and I know I will be in jail.', and Hope said that she was too sick and drunk to know anything about it when he put her in the bath tub; he said that he put a belt around her arms, and tied her, and James then talked to Hope some more about the Colorado wife. James then said to Hope, 'Well, I went in with you, and I will take the rap. I

will have no defense.' He said that at that time he gave Hope $30.00. He had only $40.00 with him, and he told Hope at that time, 'I will take all the blame.' Hope told James that he had cleaned the house up good, and had taken the blankets, and sweater, and so forth, to his house, and had burned them up, and he then told James that he had thrown the body of Mary into the fish pond. Hope said that he had taken all of the evidence to his, Hope's house, and destroyed it. James said he then stated to Hope, 'You damned fool, did you burn up that stuff?', and Hope said, 'Yes.' James stated then that the woman—he said he didn't know whether it was his wife, or his girl, but he said, 'She will spill everything.', and Hope said not to worry about her, that he had enough on her to hang her, told James that he and the woman went to a party on the Sunday night preceding the date on which they were talking, and that she knew all about it, anyway, but she would be afraid to talk. James said he had a notion to call up, but was afraid that if he did that the woman would talk anyway, and he didn't want to have to kill them both. Hope told James that he took the snakes away, and while the woman was in the house at the party which they had attended, he turned the snakes out. He again assured James that he had enough on that woman to keep her from talking. Hope then told James while they were talking in the restaurant that some people had come while he, Hope, was in the house on Verdugo Road in La Canada trying to have the snakes bite Mary, but that he had had the blinds down, and the

doors locked, and he was in there with Mary, and he didn't answer the summons that had been given at the door. James said, 'That probably is when Ethel was there and left the note.' Hope had told James that if he could kill Mary as he had, that they could get double indemnity on the insurance, and they would split it 50-50. James said at that time he was afraid about what Hope had done, and thought he had better take some one with him when he went home, so he took Pemberton and the girl with whom he was keeping company, Viola Lueck, with him that night, as he didn't want to find her alone. He said, 'The rest of it that Hope has told you is true.' He said then he didn't see Hope any more from that day at lunch, which was Monday, August 5th, for about a month. He said Hope then began to come into the shop and mouch him for money. He said he had given him $100.00 on Sunday, August 4th; he had given him $30.00 when they had lunch; in the shop he had given him $25.00 on one occasion, some other amount on others, and one time when he had returned from San Francisco he had given him $100.00. He said that on an occasion or two he had a notion to kill Hope, but he knew that Mrs. Hope knew all about it, anyway, so he didn't want to do that. He said that Hope began to act very screwy in the shop, and he came in there and was talking about being picked up, so Hope told James that he was going to San Francisco again, and Hope was given $25.00 by James to go to San Francisco. He said that when the insurance cases were over, when he, James, got the $1700.00 in

insurance, Hope came to Los Angeles, and James gave him another $100.00 and told him he would share the $5,000.00 if he got it; that about two weeks before James was arrested Hope came one night, and was drunk, and was beefing, James said, and said that James told him, 'Well, we played and lost.' James said, 'I am not going to be chiseled anymore for money.' Hope said, 'If you don't give me some I will squeal.' James said, 'All right, squeal.' He said, 'Go ahead and squeal.' James said, 'Now, that is the story, and I never would have told it if Hope hadn't squealed. There isn't enough men in the District Attorney's office to make me talk.' That is the end of the conversation that we had with James in the restaurant."

(b) Compulsion Disproved by People's Witnesses

As heretofore pointed out, petitioner testified that about ten o'clock on the night of May 2d (which would be about two hours before he went out to dinner and made the statements just above set forth), he was threatened by Southard that he would "beat his God damned head off," if he didn't tell the truth. This was expressly denied by Southard. (R. 613.) Petitioner's testimony was also shown to be false by Killion's testimony heretofore set forth to the effect that he was with petitioner at all times during that day and evening; that from the time petitioner was taken from jail until he was returned to jail, no force or violence or threats of any kind were used

upon petitioner by any person. Petitioner's testimony was also shown to be false by the testimony of Mr. Stewart, Chief Deputy District Attorney, who testified that he was with petitioner almost continuously from the time petitioner arrived at the district attorney's office in the company of Killion and Gray at about one or two o'clock p.m. until petitioner left with them about midnight to have dinner; that he was with petitioner thereafter from about half past one or two o'clock on the morning of May 3d, until the confession made at that time to Mr. Fitts was completed, and that he (Stewart) stepped out for a short time at about six o'clock while petitioner had some coffee and sandwiches. (R. 587, 588.) Mr. Stewart, on cross-examination, explained that his expression "almost continuously" covered "my departure for a few moments or for five or ten minutes at a time," which occurred a few times during the course of the afternoon and evening. (R. 591.) He testified that he did not remember seeing Southard in the room with petitioner at all, except that Southard and Davis were present when petitioner made a statement which was taken in writing. He further testified specifically:

> "Q. Now, during the time that James was there in the office, and you were there also, was Southard, to your knowledge, ever in the company of James alone?
>
> "A. He was not, to my knowledge.
>
> "Q. Was there any person who, so far as your observation went, was continuously with James?

"A. To the best of my recollection Gray and Killion, or either of them, were with him at all times." (R. 594.)

From the foregoing it is obvious that while James claimed in his testimony that he was threatened by Southard, Southard specifically denied it and Killion and Stewart testified to circumstances which showed clearly that there was no opportunity for the making of any such threat by Southard as testified to by petitioner. The jury were justified in believing that petitioner did not tell the truth relative to being threatened.

(c) Formal Confession by Petitioner

Upon the return of petitioner with Gray and Killion from the cafe where he made the long informal confession to the officers, and beginning about one-thirty in the morning of May 3d, in the presence of District Attorney Buron Fitts, Chief Deputy Stewart, Killion, Gray, and others, the formal confession, in question and answer form, was taken. District Attorney Fitts did most of the questioning. The statement was taken in shorthand by Miss Dorothy Adams, a statement reporter for the district attorney's office. We have heretofore reviewed the circumstances under which this formal confession was made. In addition to what has already been stated, it may be pointed out that Mr. Stewart specifically testified as to his observation of the petitioner during the period that the petitioner was in

the company of Stewart (which included the time of taking the formal confession), that petitioner was calm, rational and coherent; that petitioner's answers were responsive; that petitioner gave no appearance of fright; that there was no force or violence used upon him; that there were no offers or promises of immunity or reward held out to him or hopes of immunity or reward, and that all statements made by petitioner were freely and voluntarily made. Stewart testified that prior to the making of the formal confession in Mr. Fitts' office, no offers or promises or hope of immunity or reward were extended to petitioner and all statements made by him were freely and voluntarily made; that petitioner sat at the left of Mr. Fitts, at the end of the desk, very much in a relaxed attitude, smoking a cigar, perfectly composed and calm; that he was emotionless; that there was no emotion whatsoever shown by him, and that petitioner was just as calm and collected as anyone there. (R. 587-590.)

Miss Adams, the statement reporter who took the confession which she said started at 1.55 a.m., May 3, 1936, and ended shortly after 2.50 a.m. of the same date, reading from her notes taken at the time, testified to the following questions and answers: (R. 641-659.)

* * * * *

"A. Mr. Fitts: Mr. James, the boys have told me that you told the story. Mr. James: They have got it.

Q. Will you just begin in your own way and tell me the story that you told them down there?

A. It's a long one; it will take three or four days.

Q. All right, go ahead.

A. I started it the week my wife went to Long Beach, which was around July 3rd or 4th. This fellow Hope came to my house and said he was out of work, broke, and his gal threw him out and he didn't have any place to sleep. He was drunk. He drove up to my garage where my sister and I were doctoring some chickens that had the roup. I wouldn't let him stay that night and gave him a dollar and told him to go somewhere where he could get a bed. I said, "You get sober and come up tomorrow night. You are a good friend of mine and if you are in bad shape I'll let you stay here until you get on your feet." He said, "I'll be up here sober tomorrow", and so he did. He came up sober and stayed Tuesday night and Wednesday night. My sister was there. She met him and fixed our meals. Thursday night——

"'Q. When was this?

"'A. I'm talking about the first of July on.

"'Q. This conversation that you are giving us, when did that take place?

"'A. If you could tell me the date that she went to Long Beach on this convention which was around the 1st to the 4th of July, I could tell you the exact date.

"'Q. It was on Thursday following the 4th of July, 1935.

" 'A. As I said, he came up Monday night drunk after I had taken her to Long Beach Sunday.

" 'Mr. Gray: July 4th, 1935, came on Thursday.

" 'A. That is the wrong date, then. I took her to Long Beach on Sunday. It was earlier than the 7th.

" 'Q. Could it have been the last day of June?

" 'A. It must have been because she came back and was home a week before we were married and we were married the 19th.

" 'Mr. Fitts: What convention was that?

" 'A. It was a dental convention, and she had had a lot of dental work done, a special bridge, and they gave it to her free if she would model for them. She took a week off to go model. As I said, when I took her down Sunday, he came up Monday night. My sister was visiting me from Birmingham, and I gave him a dollar and said to come back the next night sober. He came back and stayed Tuesday and Wednesday night, and I gave him a key. He slept on a sleeping porch in front of the house. Thursday my sister said she was going to spend the night with Ethel—that's my niece. He wasn't coming home. He never came home all night; he may have gone and stayed the night with his girl. I didn't ask him. Thursday afternoon I went to the Italian Village and I got drunk. I didn't go back to my business. I met a couple of girls there and I danced with them all evening. I think it was about five o'clock when we left and I couldn't drive my car, and this girl said she was a good driver. She had

not been drinking much, and I told her I would give her $10 if she would drive me home. After we got in my car I got so drunk I passed out. She let this blond headed girl out somewhere and she took me home and put me to bed.

"'Mr. Gray: Who was that girl?

"'A. That is that Reed woman, Madge Reed. She got hungry and went out and got herself something to eat. Naturally I went to sleep, and while I was asleep my wife came home. Some dentist who lived close to us decided to come see his folks and brought my wife home with him. She came in and saw this woman coming out of the bathroom. The woman said, "Are you his sister?" That is what my wife told me. I was asleep and didn't know. She said, "No, I'm not his sister; I'm his wife. Who are you?" She said, "I'm just a friend of his. I brought him home, and he told me he lived here with his sister." So she told her she was my wife and she took her to the bus in the car to Montrose and put her on the bus. After putting her on the bus she came back home and I don't know, it must have been around midnight when she woke me up bathing my face with cold water. I said I was surprised to see her there, and she said yes, and she was surprised to see me here. I said, "I wouldn't have been if I had not gotten drunk." I said, "I meant to go to a picture show and stay out late." I said, "You should have told me you were coming home," and she said she didn't know she was coming home. She kept laughing and grinning and finally said, "Who was the woman you had here?" I couldn't

remember her to save my life. I think she knew the stupid condition I was in and was honest and hadn't any idea I had a woman there. She said, "You had a very pretty brunette here.", and she said, "I took her down to the bus and sent her home." So that was about all she said about it. She didn't seem to be mad. She wasn't a jealous woman.

"'Mr. Fitts: You are speaking now of Mary, your wife?

"'A. Yes. I believe it was Saturday this girl came by the shop—

"'Q. Meaning the Reed woman, now?

"'A. Yes. She said, "You owe me $3.00 for a taxicab. You nearly got me killed the other night. You told me your sister lived there. What did you tell me that lie for?" I said, "I was drunk. I might have told you anything when I was drunk." I said, "You didn't go home in a taxicab; my wife told me she put you on a bus." She said, "I didn't get on a bus; I got a cab, but I spent a dollar for dinner," and I gave her a $5.00 bill and she told me how sweet my wife was to her. I said, "I never did anything like that before and I suppose she knew I was drunk." Then she left me. She got the money at the barber shop; I gave her a $5.00 bill and she left.

"'Q. When did you first discuss with Hope the question of killing your wife, Mary?

"'A. When she was in Long Beach while he was there.

"'Q. While Hope was at your place and your wife Mary was at Long Beach?

"'A. Yes. Somehow or other he knew she had this insurance. Whether I told him or she told him I don't know. Anyway, he knew she had this insurance. After she came back he knew she was very sick. He talked to me and said, "She is going to die anyway; why don't you kill her?"

"'Q. What did you say to that?

"'A. I told him I couldn't do it. He said, "Let me do it." I said, "How would you do it?" "Well," he said, "I'll take her up here and I'll shoot her in a holdup." I said, "Yes, there have been a lot of people hung for that." So he had some kind of a white powder in a box. I don't know what it was., but he said, "I've got something right here. I have been working with a bunch of racketeers. You can just break the skin on your hand and rub a little bit on it and it will kill you in five minutes." I thought it was ridiculous. In fact, he wanted me to get one of my chickens and try it on it. He was drinking and I didn't pay any attention. That is where he sprung the story on me about the rattlesnakes. I never saw a rattlesnake bite anybody. He said, "These California rattlesnakes will kill you in fifteen minutes. I'll get a good couple of snakes and do the job myself." It was agreed upon that I would give him half the money.

"'Q. Half the money with which to get the rattlesnakes?

"'A. No, that I collected from the insurance. I gave him $20 and he went out, and the next day——

"'Mr. Gray: Just to interrupt you there, I think you will recall in your story before this point about the rattlesnakes, after he had talked to you about the powder, didn't you say that he went away for a little while and then he came back and told Mary that he had a medical student and could perform an abortion on her that she wanted performed? Isn't that correct?

"'A. Yes. When Mary came back from Long Beach she was pregnant and I don't recall just how he met her; it seems he came to the house and I introduced her. She asked me who he was and he told her he was a medical student and she asked me if he was, and I told her yes. After she had been sick there for quite a while she said she decided that she couldn't go through with having her baby. She said, "I can't make it; my health won't permit it." She wanted me to take her to a doctor. I was afraid to because she was in very, very bad shape. She said, "Hope tells me he is a doctor. Why don't you let him take care of it?" I said, "When I see him again I'll tell him about it." That was when he disappeared and I didn't see him for a couple of weeks.

"'Q. That was in June or July?

"'A. July, after she came back from Long Beach. So Hope got to going out to the house and he talked with her, visited her, and told her he was a medical student. So it was finally agreed that he would take care of her. That is where his story comes in, on Sunday morning that he was supposed to have performed the abortion on her was the Sunday moning that if

he put her foot in the box with the rattlesnakes, I didn't see it—was the morning he did it.

"'Mr. Fitts: Up to that time you two had agreed to have the snake bite her. Is that right?

"'A. Yes. He had gone out and got some; in fact he brought three up there.

"'Those are the ones he got in Long Beach?

"'A. I don't know, he never would tell. He had certain kinds of boxes made and he brought them up in a box. It was dog days and they were blind. They wouldn't bite anyone. He took those away and he brought two more back and they would bite but they didn't have anything in them.

"'Q. How do you know that?

"'A. Because he put rats, chickens, and a rabbit in the box with them. In fact he put a rabbit in the box with one of them and the next morning the rattlesnake was dead and the rabbit was walking around.

"'That was the second batch. You bought three altogether?

"'Yes. I laughed at him about his rattlesnakes and that was the time that I told him we would lay off of it. So he got a spell on him one day that he had found some hot ones. He said, "I have found a fellow in Pasadena who has some that will really do the work?

"'Mr. Grey: When did you bring the spiders?

"'A. That was somewhere in that time.

"'Q. Was that before you brought the last snakes?

"'A. Yes.

"'Q. By Mr. Fitts: What kind of spiders?

"'A. He took my car. He got it one morning from the place where I was getting it greased. I think he kept it about three days. He came back drunk. He told me a cock and bull story. He said he had gone to Phoenix to get these black widow spiders. He had a glass jar full and the top had holes in it.

"'Q. How long was that before you bought the third bunch of rattlesnakes?

"'A. That was just before he brought them. So he said, "All you have to do is throw them in bed with her and they will bite her. I laughed and threw his damned spiders out. He came over there to the shop and I said, "Hope, you are nuts and so am I. Forget about it." So he went away and he said he would. The next time I saw him he was drunk. He is nuts when he is drunk. He said, "Come out here; I have a tip where I can get some hot snakes," and I laughed at him. He said, "All right, it will cost you $6.00. You give me the $6.00 and I'll go over and get them."

"'Mr. Killion: When you had this conversation what was it you said to each other about having already committed the crime about doing what you had done with the snakes?

"'A. I didn't want him to get the other snakes. I said, "We will fool around and get in trouble." He said, "We already are. We have been hauling rattlesnakes around in the car, which is a deadly weapon and a felony." I didn't know anything about that. I said, "No one knows it but you and I." He said, "I know it, and you aren't

going to walk out on me now. You have a barber shop and you are making a living and I want to make some money." I gave him the money and he goes over and gets the two hot snakes.

"'Q. What day was that?

"'A. Saturday night before she died Monday.

"'Q. How much did you give him?

"'A. $6.00.

"'Q. Was his wife along at the time?

"'A. Yes.

"'Q. Does she know anything about that, what the snakes were to be used for?

"'A. To a certain extent. So he came back Saturday night and met me at the shop and he took me home and we got drunk together.

"'Q. Tell about the transfer of the snakes in the service station.

"'A. He brought the snakes back from Pasadena in my car. He put them in his coupe and followed me to my house. I had a pint of whiskey. We drank and my wife drank with us. She dearly loved booze. No matter how sick she was she loved a drink. He had the two rattlers with him. He put them in the garage.

"'Q. Where?

"'A. The garage.

"'Q. What were they in?

"'A. In a wooden box with a glass top on it. I don't know where he got the boxes. He said he had them made somewhere. He had one in each box. So he put them in the garage and locked the garage up, and some time during the night he got in his coupe and left. He said, "I'll be back up here in the morning."

" 'Q. And before he left that night, while you were drinking, he talked over with Mary again the performing of the abortion that night?

" 'A. Yes, he promised that he would come back the next day and perform the abortion. So she was very happy to do it. So the next morning, I don't think I ever quit drinking. I think I drank along all night, and I was pretty tight when he got there that morning.

" 'Mr. Fitts: What time did he arrive?

" 'A. Around 11 o'clock. I gave him practically all the money I had, and $100, and I left, and as to what he told me about her being taped and tied up, I don't know. He took care of that himself. I left there about one o'clock and I think I returned about four. He said she would die in an hour, or fifteen minutes. I returned about four o'clock Sunday afternoon and I went in to see her and he had her full of liquor. In fact, he was very drunk himself. There were two or three bottles setting in the room where they had been drinking.

" 'Mr. Killion: What did he tell you when you left at one o'clock? Did he tell you he was going to do the work?

" 'A. Yes. I told him I couldn't have anything to do with it because she had been too good to me, and I just couldn't have anything to do with that part of it. I was very drunk and I got in my car and left, and I just drove around. I went back about four o'clock and asked him how she was. He was so drunk he hardly knew what he was doing himself. I stayed there a while and she didn't complain about anything bothering her at all.

"'Mr. Fitts: What was she doing when you got there?

"'A. In bed covered up. So he took the car and left and he stayed until about six o'clock the next morning.

"'Q. Where were the rattlesnakes at that time?

"'A. He took them with him.

"'Q. Did you see him bring the rattlesnakes in the house?

"'A. I didn't see them in the house. I saw them in the garage.

"'Q. Did he tell you he had her bitten by the rattlesnakes?

"'A. When I came back, he did.

"'Q. What did he say?

"'A. He said he put her foot in the box with one and it bit her three times. He said, "I don't know what's the matter with her. Unless the snakes has bitten so many times he's not poison. It doesn't have any effect on her at all." I talked with her and she was drunk.

"'Q. What did he say he had done?

"'A. He said he had inoculated her in the leg and performed the abortion and her leg hurt. She kept complaining and that was the first time I saw if after he left. His wife was waiting for him on the corner all the time in her car. He stayed all night. He left me with her. Naturally I was all upset and she and I just sat there and drank all night. I don't think she ever felt her snake bite. So he came back about six o'clock the next morning and her foot and ankle were swollen. I said, "She's all right, nothing the

matter with her", and we talked her over and I said, "What are you going to do about that? We had better call it off." He said, "We have gone too far. They will know it's a snake bite and she is going to talk, and we have gone too far to stop." I said, "What are we going to do with her?" He said, "You leave that to me. You go on and go to work and I'll take care of her." I said, "What are you going to do with her?" And he said, "I'll tell you what I'm going to do. She smokes a lot of cigarettes, and lots of people die by smoking in bed. I'll burn the house up. I kept taking a few drinks and I got in the car and left about six o'clock.

"'Q. With the understanding that he was going to take care of her by burning the house?

"'A. That's what he said he was going to do. I went to work. Instead of driving on Wilshire Boulevard I drove all the way to Sawtelle. I was drunk and was trying to get sober. Finally I arrived at work a quarter of nine. I had some breakfast, and about one o'clock or a little after he came down to the shop and said, "Everything's all right."

"'Mr. Killian: He said he got rid of her, did he not?

"'A. We went to Melody Lane and had dinner and talked about it on the way back.

"'Mr. Fitts: Back where?

"'A. To the shop.

"'Q. When you say "dinner" you mean lunch?

"'A. Yes, lunch. On the way back to the shop I said, "Did you burn the house up?" and he said no. I said, "What did you do?" He said, "I threw her in the bath tub and drowned her."

I said, "You God damned fool, that's the worst thing you could do." He said, "Why?" and I said, "That's the worst thing you could have done. I had a wife drown in a bath tub in Colorado Springs a little while ago." He didn't know that. If he had he wouldn't have done it. "Well," I said, "you really played hell but it's too late now."

"'Q. Because she was dead?

"'A. Yes.

"'Q. That is what he told you?

"'A. Yes. I said, "What did you do with her, leave her in the bath tub?" And he said, "No, I threw her in the fishpond." I said, "That won't stick. They will throw me in the jug when they find her. I'll be a good sport. You made a God damned fool of yourself and me both, but I'll take the rap. I won't talk. There ain't enough men in the district attorney's office to make me talk", and there wasn't if he had not told it. You never would have got me to talk. So of course I arranged for this couple to go home with me.

"'Q. Did they know anything about it?

"'A. No.

"'Q. They were perfectly innocent?

"'A. Absolutely. They don't know a thing about it.

"'Mr. Killian: At this time at the luncheon where you went to lunch together, did you give him some money?

"'A. I gave him all I had. I think I had $40 and I gave him $30 of it. I said, "Here's all the money I have. You get the hell out of here and stay away. I'll take the blame for it

and I won't talk. I was a God damned fool to get drunk and enter into a thing like this with you. If I had been in my right mind I wouldn't have done it. You have made a damned fool of us and I'll take the rap." I said, "I don't care about living anyway. Somebody is going to jail and it doesn't need to be both of us."

"'Mr. Davis: James, in your story this evening you told us that certain evidence had been destroyed because of blood on blankets. Tell Mr. Fitts about that, will you?

"'A. Oh, yes. While we were at lunch he said, "I cleaned up the house. I got water all over the floor of the bathroom. I had your sweater on. I mopped up with a few things, towels and things, and her foot had bled all over that bed."

"'Mr. Fitts: What?

"'A. He said her foot had bled all over the bed.

"'Q. Where the snake had bitten her?

"'A. Yes. He said, "I took your sweater and all the towels and the blankets and I straightened your house up good." I said, "What did you do with them?" He said, "I took them over to the house and burned them." I said, "Are you sure you burned them?" I said, "Are you sure?" And he said yes. I said, "Hope, if you took that stuff over to your house where that woman of yours can get hold of them she will break your neck." He said, "I didn't; I burned them." I said, "Did you burn the blankets too?" He said, "yes. She wouldn't talk anyway. I have got stuff on her that she couldn't talk." I said, "What have you got on

her?" and he said "It's her business", and I couldn't get it out of him. I don't know what he has on his woman.

"'Mr. Gray: Did he tell you that he had told her all about what happened?

"'A. He said he told her when he left Sunday night what had happened. He said they went to a party and while they was in the party he said the snakes were in the car. I knew what those snakes did, they rattled every few minutes. If you put one in the box it would get mad and rattle. I said, "You don't mean to tell me you took those snakes along in the car with that woman and she didn't know what they were?" And he said, "Yes." I kept arguing with him and he finally admitted to me that she knew about it.

"'Mr. Fitts: James, while you are making this statement let's clean it all up, if you will. Did you kill the girl back east in Colorado?

"'A. No, that was on the level, absolutely.

"'Q. And your nephew in San Francisco?

"'A. I was here and he was up there.

"'Q. Did you have anything to do with that?

"'A. How could I?

"'Q. I am asking you?

"'A. You know how he got killed?

"'Q. Automobile accident.

"'A. Could I have had anything to do with that. My sister is crazy, and she's always had it in her mind. She is really insane. She has had it in her mind that I killed my wife in Colorado and her son and Mary.

"'Q. In other words, she has just been wrong on two of them, is that right?

" 'A. Yes. The same thing is affecting her that it is affecting me."

" 'Q. You mean it is hereditary?

" 'A. I think it is. I am anxious to find out.

" 'Q. Let me ask you. You were at the point in your story where you were having lunch the day, Monday, of the killing of Mary, at which time you gave him $30. and told him to beat it and not to see you any more. He has been coming back to the shop frequently since then, hasn't he?

" 'A. Yes. It seems like when I buried Mary —I went to the beach and stayed a month and I didn't see him then.

" 'Q. This Miss Reed, you did see her at Hermosa Beach?

" 'A. Yes.

" 'Q. And you did offer her a thousand dollars to say she had seen Mary alive on Monday after you left for the shop?

" 'A. I was drunk when I was with her and I was practically a blank and I might have offered her a thousand.

" 'Q. The story that Dr. Densley has told about seeing your wife Mary around the house after six o'clock in the morning, he is clearly mistaken, isn't he?

" 'A. I don't see how he could. Of course I wasn't there after six and I don't think in her condition she could have got up and gone out in the yard, and I don't think Hope would have let her.

" 'Q. When you left for your shop Monday morning, and you left Hope and Mary there, you

left with the idea that she was to be murdered by Hope?

" 'A. That's what he said he was going to do.

" 'Q. That was your idea?

" 'A. Yes.

" 'Q. And when you came home and found her in the fish pond you had been told in the meantime by Hope that he had drowned her?

" 'A. Yes.

" 'Q. When you first discussed and arranged between yourself, that is, Hope and yourself, the murder of your wife Mary, it was for the purpose of collecting the $14,000 life insurance?

" 'A. It wasn't $14, it was $10,000.

" 'Q. $10,000, and you were to take half of it, $5,000, and Hope was to get half of it?

" 'A. That's right.

" 'Q. And it was in pursuance of that arrangement made in July sometime, that three different batches of rattlesnakes were purchased?

" 'A. That's right.

" 'Q. And it was further in pursuance of that agreement between you two that the third batch of what you call hot snakes were purchased by Hope and the story concocted and told to your wife that an abortion was to be performed?

" 'A. That's right.

" 'Q. And when the supposed abortion was being performed upon her it was not the idea of Hope or yourself at all to perform an abortion but to actually murder her for the purpose of the life insurance?

" 'A. That is what he said he was going to do.

"'Q. And that was your understanding?

"'A. That's what he told me.

"'Q. And in keeping with that agreement between you two, you gave him $20.00 one time to buy snakes, and $6.00 another time, and on the day of the murder, $100.00 and that $100.00 you paid him was for the preliminary part of the murder of your wife Mary?

"'A. That's right.

"'Q. And have you ever told anybody about this? Have you ever discussed this with Lois? Did you ever admit to Lois that you had killed your wife?

"'A. Never.

"'Q. Or to anybody else?

"'A. Never.

"'Q. Is there anyone who knows anything about the facts in this matter other than you two?

"'Q. Not a soul on earth unless he has let it out himself.

"'Q. Did you see the snake bite your wife?

"'A. No, he took care of that after I left.

"'Q. He told you that he had done so?

"'A. He told me that.

"'Q. And that was all right with you?

"'A. That was all right with me.

"'Q. This statement that you have made has been made freely and voluntarily?

"'A. Yes.

"'Q. No promise of immunity or hope of reward, or threats or duress held out against you?

"'A. I have told the true stuff.

"'Q. Freely, and it has been made by you?

"'A. Yes.

"'Mr. Killian: About the letter that was found on the table of the living room of your home. Will you tell Mr. Fitts about that?

"'A. She wrote it before I left home.

"'Q. She wrote it at your direction?

"'A. Yes.

"'Q. And you believe she wrote it because she was so intoxicated she wrote what you directed her to write?

"'A. Yes.

"'Mr. Fitts: That was the morning of the murder?

"'A. That's right.

"'Q. August 5th?

"'A. Yes.

"'Mr. Killian: Did Hope tell you that while he was in the house Sunday some people came?

"'A. Yes. When I got back to the house he was very nervous. He said, "This is a hell of a hot place up here. There have been at least a dozen people around here." I didn't know who had been around the house there except my niece and her husband and her father-in-law and mother-in-law, and they were the ones who left the note there. It seems like one or two other people came there looking for Smith but he had the shades all down and the house locked. I was out in my car so naturally they didn't think we was home.

"'Q. After the conversation with Hope at lunch on Monday, you took Pemberton and Viola

Lueck home with you because you knew you would find the body of Mary in the fish pond?

" 'A. That's right.

" 'Q. You were surprised that you had not heard during the day that somebody had found her, and you didn't want to find her alone?

" 'A. I didn't believe he had put her in the water as he said, but that he had left her in the house.

" 'Q. And that is why you brought them home with you?

" 'A. Yes.

" 'Q. And the story you have told us about Pemberton and Viola Lueck is true?

" 'A. Yes.

" 'Q. They knew nothing about the plans you and Hope had?

" 'A. That's right.

" 'Q. Concerning the money you gave Hope in addition to the amounts mentioned by Mr. Fitts, you have since given him various amounts of money when he came to your shop demanding money?

" 'A. Yes.

" 'Q. About how much?

" 'A. When I had that insurance settlement I bought my place and gave him $100.00.

" 'Q. That was when he returned from San Francisco?

" 'A. He said he had been there but I don't think he had ever been there. On several other occasions he came to the shop and demanded money. After I lost that insurance case he came to me there and told me his wife was in the

hospital dying and he had to have $75.00. I wouldn't give it to him. He begged me and begged me until I gave him $2.00. I said, "That's the last time you are going to get any money from me."

"'Q. Did you have a conversation with him regarding what you would do in case you were successful in securing insurance on the second policy?

"'A. I told him I would give him half of it.

"'Q. If you got $5.00 or $10,000.00 you would give him half of it?

"'A. Yes.

"'Q. Mr. Fitts: Hope says, Mr. James, that in the purchase of the second batch of rattlesnakes, he got those at Ocean Park and that you went down there with him to get that batch.

"'A. He is lying about that to you. He never let me know where he got any snakes. I did know he got the last ones from Joe in Pasadena.

"'Q. How did you know that?

"'A. He told me.

"'Q. Have you ever gone down to the Ocean Park place and studied the habits of the rattlesnakes?

"'A. The one time I was in there.

"'Q. But you didn't go with him?

"'A. No, I didn't go with him.

"'Q. At any time?

"'A. No.

"'Mr. Killion: During this last conversation with him about the money, did he threaten to take some action in case you didn't give him some money?

"'A. Yes. When I told him I had given him all the money I was going to give him, he said if I didn't give him $200.00 he said, "Give me $200 00 and we'll forget it all", and I said, "No, this is the last time I'm ever going to give you a dime of money."

"'Mr. Davis: When you reached home on the evening of the 5th with the Pembertons, and you didn't find your wife in the house, where did you expect to find her?

"'A. Where he said he had put her.

"'Q. Where did you expect to find her when you didn't find her in the house?

"'A. In the fish pond.

"'Q. And did you go to the fish pond and look for her?

"'Mr. Kilgon: At what time in the morning did Hope tell you that he had put the body in the fish pond?

"'A. He didn't tell me just what time. I believe he told me that he put her in there around 11 o'clock.

"'Q. Did he ever make any threats to you about squealing on you if you didn't give him some more money?

"'A. I told him "You don't need to think you are going to bleed me for money. We're all through. We played and lost and that's all. I'm never going to give you any more money." He said, "All right. I'm going to do some talking." I said, "You are just as guilty as I am. If you want to talk go ahead." And I never saw him any more until today.

"'Mr. Griffen: Going back to Sunday afternoon, on August 4th, I believe you told Mr. Fitts

that you went out riding in the afternoon in the car and you got back at 4 o'clock.

"'A. I think so. I didn't keep any particular time because I was drinking and I think I got back around 4 o'clock.

"'Mr. Fitts: Will you face Hope and tell him he killed your wife?

"'A. Yes.

"'2:50 A.M. CHUCK HOPE WAS BROUGHT INTO THE OFFICE.

"'Q. Mr. Hope, Mr. James has told us the story in detail about the rattlesnakes.

"'Mr. Hope: Yes, sir.

"'Q. That back in July, while his wife was at a convention, that you and he discussed the question of killing his wife with a rattlesnake.

"'A. No, sir.

"'Q. For the purpose of getting the insurance. That he paid you $20.00 on one occasion, $6.00 on one occasion, and $100.00 on another occasion?

"'A. That is correct.

"'Q. For the purpose of buying rattlesnakes?

"'A. Yes.

"'Q. And for the purpose of killing his wife?

"'A. No, sir.

"'Q. For the purpose of killing some woman?

"'A. Yes, sir.

"'Q. You tell him what you told me, Mr. James.

"'Mr. James: He knows it. You don't have to tell him.

"'Q. You tell him just what you told me a moment ago.

"'Mr. James: He knows that he went out and got three rattlesnakes and they were blind and wouldn't bite and he got two more and they wouldu't bite a damned thing, and he said he knew where he could get some that would bite and he went to Snake Joe's and got them. You had just as well come on, boy, and tell them what they know.

"'Mr. Hope: The first two batches were bought for some friend of his who was going to kill his wife. I bought the snakes and delivered them to him. The third batch he told me he was going to kill his own wife, and he took those snakes home.

"'Q. You knew when you were buying them, the third batch, that it was for the purpose of killing James' wife?

"'A. Yes, sir.

"'Q. And you bought them with that knowledge?

"'A. Yes, sir—no, sir, he told me that after he got the snakes in the car.

"'Q. You went on up to his house with him?

"'A. Not Saturday night, no, sir.

"'Q. Was he at the house Saturday night?

"'Mr. James: You bet he was.

"'Mr. Hope: I certainly wasn't. I was with my wife.

"'Q. Mr. James further says, Mr. Hope, that you represented to Mrs. James that you were a medical student and were to perform an abortion on her.

"'Mr. Hope: I never talked to Mrs. James.

"'Q. Did you know Mrs. James.

"'A. Only just one time that I had breakfast with them at their home and seeing her once at the shop and once on this other Sunday.

"'Q. Was she at home at the time you spent out there repairing chicken houses?

"'A. One day. His sister was there, and also his niece.

"'Mr. James: What day was that she was there?

"'A. That was on Sunday.

"'Mr. James: The Sunday she came back from Long Beach?

"'A. No, sir, before she went to Long Beach.

"'Mr. Griffen: Hope, you tell us this, how does it happen that you were introduced to Eva Murphy as a man with medical training?

"'A. Absolutely I don't know. He told that.

"'Q. No, he didn't. His sister Eva Murphy knows you as a medical man.

"'A. No. I have never represented myself as that.

"'Q. As a man who studied medicine?

"'A. Never.

"'Mr. Fitts: Mr. James further says that Sunday when he left the house at about 2 o'clock in the afternoon, that he left you with his wife. That when he returned about 4:00 Sunday afternoon that you told her you had had her bitten by this snake and she was in bed, and that she had bled quite freely. You told him that later, that her leg had bled freely.

"'Is that true, James?

"'Mr. James: That is exactly the truth.

"'Q. That Mr. James remained with her that night and you returned back to the James'

residence the next morning, around 5:30 or 6:00 in the morning.

" 'Mr. James: Right.

" 'Q. You told him you were going to finish the job that morning, that she was an inveterate cigarette smoker and had been drinking and that you were going to burn her body by burning the house down. Is that true?

" 'Mr. Hope: No, sir. I left the James residence at 2:30 Saturday afternoon and didn't return until one Monday morning.

" 'Q. You did return Monday morning?

" 'A. Yes, at one o'clock, not five.

" 'Mr. Plummer: Whose car did you drive?

" 'A. Mr. James' car.

" 'Q. Where did you drive it?

" 'A. I took my wife up and returned the snakes to Joe's.

" 'Mr. Fitts: James says that when he left that morning you were left alone with his wife.

" 'A. I was never alone with her.

" 'Q. That later, at one o'clock on Monday, August 5th, you met him at the shop and told him you had drowned her in the bath tub. Is that true?

" 'A. No, sir, I was lunching with my wife on Virgil and later went to the laundry between the hours of 12:30 and 1:30.

" 'Q. At any rate, you did accept $100.00 for the third batch of snakes?

" 'A. Yes, sir.

" 'Q. And that was given to you up at Mr. James' house, is that true?

" 'A. He paid me the hundred when I got the second batch of snakes.

"'Q. How much did he pay you on the third batch?

"'A. He just gave me the money to buy them, $10.00 to buy them.

"'Q. Later on he paid you $100.00 did he not?

"'A. After he received the insurance money.

"'Q. And you knew it was from the insurance money?

"'A. Yes.

"'Q. And you knew he collected the insurance money upon his murdered wife?

"'A. Yes, sir.

"'Q. And you received that money because of whatever participation and help you had given him in the murder of that wife?

"'A. Yes, I stated that before. On the Sunday, on the 4th, Mr. James never left the house to my knowledge because I had his car and had gone with it and did not return until one o'clock in the morning. The car was seen by numerous people.

"'Q. Mr. James, did you take those snakes back to Joe's on Sunday?

"'A. (Mr. James) No, he took them back.

"'Q. At what time?

"'A. He left there with them about four o'clock.

"'Mr. Plummer: Was he alone or was his wife with him?

"'A. He told me his wife was waiting on the corner in the car.

"'Mr. Fitts: Did he leave you alone with your wife then?

"'A. Yes.

" 'Q What was her condition then?

" 'A. She seemed to be—I thought she was intoxicated.

" 'Q. You say Mr. Hope did the actual killing?

" 'A. Absolutely.

" 'Q. And Mr. Hope, you say that Mr. James did the actual killing?

" 'Mr. Hope: Yes, sir.

" 'Q. At any rate, you say that you both agreed to do the job for the purpose of collecting the insurance, the life insurance of $10,000.00.

" 'A. No, sir, when he mentioned the insurance he said it was $5,000.00.' "

B. WEIGHT OF THE EVIDENCE ON VOIR DIRE EXAMINATION

From the evidence hereinbefore related, taken on voir dire examination to determine whether the confessions were voluntarily made or were made by coercion, it would appear that, although the petitioner testified that he was beaten and threatened and suffered duress, the greater weight of the evidence was to the contrary.

With reference to the occurrences between April 19th and the 21st, 1936, when the petitioner claims to have been offered a lighter sentence, and to have been brutally beaten, it would appear to be sufficient to say that his story is expressly and unequivocally controverted not only by those who were alleged to have offered him some inducement and by those who were asserted to have beaten him, but by the wit-

nesses who booked him in the County Jail and examined his body for bruises and testified that none were there, although petitioner claimed to have been beaten until he was "black and blue from the waist up." Obviously, the jury were justified in believing that petitioner had not stated the truth, because if he had been so beaten on Sunday night, as he claimed, certainly there would have been some evidence thereof on Tuesday morning. Moreover, it will be remembered that the only complaint petitioner made to Mr. Fitts was that he had been "slapped by Jack Southard."

The slap by Jack Southard, which was admitted, was of course an unfortunate incident, but the circumstances show that it was not made with the thought of thereby inducing petitioner to confess, but was simply an outburst of temper upon the part of an officer who resented the foul thing said by petitioner concerning his dead wife. It was an unfortunate occurrence, but not one of such a character as would lead a person to confess to a crime of which he was not guilty. In short, there were submitted to the Court and to the jury two stories. One by the petitioner, uncorroborated, that he had been subjected to brutal treatment, and the other by the officers, corroborated by other individuals and' circumstances which showed that he had not been brutally treated. The jury were as much entitled to believe the story of the officers and to disbelieve that of the petitioner as they were to decide the other

way. They apparently believed the officers and not the petitioner. Therefore, we may assume that the facts as found by the jury on this controverted issue were that petitioner had not been promised anything, or threatened, or beaten, and that while he had been slapped, that incidental, unfortunate circumstance had nothing to do with his confession thirteen days later.

Moreover, it should be borne in mind that whatever treatment, whatever lack of sleep, whatever coercive methods may have been indulged in at the time of the arrest for incest and during the period from the morning of April 19th to the morning of April 21st, a period of forty-eight to fifty hours, these methods did not produce any confession of any crime on the part of the petitioner, for he made no confession at that time.

From April 21st to the morning of May 2d, a period of eleven days, he was not in the custody of the officers who are asserted to have used brutal methods toward him. During that time he was visited by his lawyer.

On the morning of May 2d, he was confronted by his accomplice, Hope, and accused of the crime. He testified that at that time he had a memory of the terrible beating which he had received on April 19th or 20th, and that he was afraid to deny the accusation. The jury had the right to believe that he had not received any such beating as he claimed, and that subsequently his assertion that he was

fearful of a repetition of that beating, or that he had a memory of that beating, was false. The jury had a right to believe that the reason he did not deny the accusation made in the presence of Hope was because it was true.

Petitioner testified that Southard, about 10.00 p.m. on May 2d, recalled to his mind the beating he had received in April, threatened that he would again beat him, and that petitioner thereupon agreed to say anything Southard wanted him to say to avoid a repetition of that beating.

It will be observed that the jury had a right to believe that this claim of petitioner as to a threat made by Southard was also false, because the jury may well have decided that the story of the previous beating was false, that consequently he could not fear the recurrence of a beating which he in fact had never suffered. Moreover, it will be noted, and this is significant, that while petitioner says that he agreed with Southard at 10 o'clock the night of May 2d to tell any story Southard wanted him to tell, no attempt was made at that time to get a confession and Southard did not propose a story for him to tell or attempt to get him to tell anything or make any confession. On the contrary, it appears unequivocally that some two hours later petitioner informed Gray and Killion, who had him in custody, that he would like to have something to eat, and that if they would take him out to get something to eat he

would tell them the story. It appears that he did eat a steak dinner; that he was provided with a cigar, and that thereafter, smoking the cigar, he recited in great detail his claim as to the manner in which the killing occurred. It will thus be observed that he chose his own hearers, he chose his own place, he chose his own time, and he chose the conditions under which he would tell what he claimed was the truth about the death of his wife. When asked by Killion if he wanted to tell the story before he ate, he said he preferred to eat first. When asked whether he wanted to return to the district attorney's office before he told the story, he said he preferred to tell it at the restaurant. He does not claim that Killion or Gray at any time threatened him or promised him anything, or used any force or violence or other coercive means upon him. He never made a confession to any person who, according to his own contention had used any force or violence or threats or coercive means upon him.

After the completion of his version of the murder as told to Killion and Gray at the restaurant, he went to the district attorney's office without objection and reiterated the story in greater detail in response to questions asked by the district attorney and others. This statement was taken by a stenographer in his presence, and no objection was made by him to telling the story at that time. When confronted by his accomplice, each of them

stuck to his version of the story as it had theretofore been recited by each of the participants in the crime.

The story as told by the petitioner was not the same story as that told by Hope. Therefore, his contention that all he was doing was repeating what the officers told him to say is subject to suspicion as to its truthfulness, because in fact he told an entirely different set of circumstances from those which the officers understood to be the facts as those facts had been related to them by the accomplice Hope. Hope threw the burden of the original planning for the crime upon James and claimed that James was the one who actually drowned his wife, whereas, James claimed Hope was the instigator of the crime, that Hope was the one who actually had the rattlesnake bite Mary James, and that Hope was the one who drowned her. Each of the participants in the crime admitted such complicity therein as to make him liable as a murderer of Mary James, but each sought to lay the burden of the greater criminal responsibility on the other. If the petitioner had merely related that which the officers wanted him to relate, as he claims he did, his tale would have been more consistent with that of Hope, and would have assumed the greater legal responsibility for the crime that was cast upon him by Hope's confession and would not have contradicted Hope in so many vital respects.

The jury under the evidence were justified in concluding that James and Hope had as accomplices murdered Mary James, and that each of them had taken such a part in the murder as to warrant his conviction of a willful, deliberate killing, perpetrated by means of torture and for money. The jury were justified in believing that James confessed only after and because Hope had confessed, and that in his bitterness toward Hope for having confessed he tried to throw the burden of the greater guilt upon Hope's shoulders in an effort to make Hope suffer the same consequences that he, James, would suffer for their joint crime.

In short, the greater weight of the evidence shows that petitioner did not confess by reason of any force or violence or threats used upon him, but that he admitted his complicity in the crime and sought by falsehood to make it appear that his accomplice was more culpable than was he, in order to "get even" with Hope, because Hope had "squealed," and that this was the real motivating cause of the confessions which he made. As related by Mr. Stewart, when the formal statement was taken petitioner sat quietly, unemotionally, smoked a cigar and answered the questions. As the verbatim statement shows, petitioner answered fully and freely, gave his own version of the affair, and did not accept suggestions made by his questioners as to what had happened, but told the matter in a different way in accordance with his own ideas. The

confession is replete with details as to matters which obviously could not have been in the minds of any of his questioners, and petitioner stated unequivocally that the reason he was confessing was because Hope had already confessed.

One other matter should be adverted to. After the confession had been admitted in evidence and all the officers had testified denying the alleged brutality, threats and coercive methods, petitioner when on the stand in his own defense advanced another story. He said that Fitts, the district attorney, had threatened him by saying that there was a mob outside clamoring for his life. (R. 734, 735.) This last-minute effort to bolster up a claim of coercive methods lacks credibility. It is in conflict with his earlier testimony, wherein petitioner stated that no threats of any kind were made in Mr. Fitts' room, or while he was in the district attorney's office before being taken to Mr. Fitts' room at the time of his arrest on April 19th. He admitted that no threats or offers were made on May 2d prior to his failure to deny the accusatory statement addressed to him by Deputy District Attorney Williams, and said specifically that prior to the giving of the formal statement in Mr. Fitts' office in the early morning of May 3d, neither Mr. Killian nor Mr. Fitts nor Mr. Gray laid a hand on him nor threatened him in any way or offered him anything.

The jury were justified, in view of this conflict, in totally disregarding the lurid afterthought of the petitioner which was wholly in conflict not only with his previous testimony but with everything that had been testified to by all the officers and others who had controverted him on his original story. No only did the petitioner confess under circumstances which the jury were justified in believing were not coercive, but confessed under circumstances which the jury were justified in holding made the confessions free and voluntary.

All the circumstances, as disclosed by the evidence herein, present an entirely different picture from that presented to this Honorable Court in the cases of *Wan* vs. *United States, supra; Brown* vs. *Mississippi, supra*, and *Chambers* vs. *Florida, supra*. In each of those cases the defendant was either a foreigner or an ignorant Negro and the record showed that acts of brutality and coercion, some of them of the most flagrant character, were committed upon the defendant or defendants with the avowed purpose of procuring a confession of guilt. There was no conflict as to the defendant or defendants having suffered such coercion or brutality or that such coercion and brutality were administered for the express purpose of procuring a confession, and in each of those cases the conviction rested solely or principally upon the confession thus procured. Such is not the record in the instant case.

3. Petitioner's Guilt Established by Evidence Independent of Confessions

The evidence shows overwhelmingly that not only were the confessions freely and voluntarily made but that the confessions were only a part of a mass of proof which established without the aid of the confessions petitioner's participation in the crime of which he was convicted. As has been hereinbefore pointed out, Hope in his testimony related facts and circumstances which incriminated petitioner in the death of the latter's wife. As was stated in the decision of the Supreme Court of the State of California affirming the judgment of conviction, *People* vs. *Lisenba*, 94 Pac. (2d) 569, at 572, with reference to the testimony of Hope—"His story was not materially shaken on cross examination." And, as pointed out in said decision, Hope's testimony was corroborated in many details by Mrs. Hope, Roland K. Kirby, Mike Allman, and Joe Houtenbrink.

Additional corroboration is found in the testimony of the witnesses Mrs. Ethel Smith and Charles Griffin. Mrs. Smith testified (R. 187, 188) to the effect that petitioner, after the death of his wife, brought to her house a trunk which he left with her and which she stored in the garage. Griffin testified (R. 189) to the effect that he examined the contents of the trunk and found pieces of rope which, according to the witness Hope (R. 81), resembled the rope which had been used

to bind Mary James at the time she was subjected to the bite of the rattlesnake.

It was also pointed out by said Supreme Court in its decision that there was also other corroboration of the accomplice Hope's testimony in the testimony of Lois Wright, petitioner's niece, who had seen Hope with petitioner at his barber shop and also at his home; in the testimony of Sam Grant, a barber in petitioner's shop, who placed Hope in the company of petitioner in the barber shop on many occasions in 1935; in the testimony of the autopsy surgeon, Dr. A. F. Wagner, and in the testimony of Dr. Gustave Boehme who examined the body of the victim and expressed opinions to the effect that the laceration and swelling of the toe and leg of the deceased were such as would be inflicted by the fang of a rattlesnake.

There was also the evidence furnished by the insurance agents who sold the policies of life insurance on the life of the victim, showing the somewhat unusual circumstances and large amount of insurance purchased by one in her station in life, and the motive that the petitioner had to cause her death.

The Supreme Court of the State of California also pointed out in its decision that the witness E. L. Taggart, an automobile man, testified that early in 1935 petitioner spoke of expecting to get a large sum of money from an estate; that the witness Madge Reed testified to circumstances tending to

establish a motive and an effort on petitioner's part to establish an alibi "in the event his foul deed came to light." All of these circumstances tended to corroborate the defendant Hope and to connect petitioner with the commission of the crime.

In addition to the foregoing, there is the evidence of the so-called Colorado affair which established that, as in this brief elsewhere pointed out, the petitioner had similarly insured and killed another wife a few years before. This evidence tended to corroborate Hope's testimony that petitioner was the instigator and perpetrator of the murder of Mary James and tended to show the motive for the crime, and tended to show that the death of Mary James resulted from a carefully laid plan to kill her for insurance money, as claimed by Hope, and not from an accident or an attempt upon the part of Hope to produce an abortion, as claimed by petitioner.

In his own defense, under cross-examination, petitioner made many conflicting statements. The Supreme Court of the State of California in its decision, on page 585 of 94 Pac. (2d), pointed out some of those inconsistencies. We have hereinbefore mentioned them, as for instance, the petitioner on voir dire testified that he had not been subject to any threats, or force, or violence, or promises by the district attorney, and yet later in his defense he testified that he had been threatened and frightened by talk of mob violence,—the latter statement being obviously something that was conjured by him for

the purpose of trying to bring his case within some of those which have been decided by this Honorable Court.

The foregoing facts and circumstances are called to the attention of this Honorable Court for the purpose of showing that, irrespective of the confessions and without them, there was adequate evidence establishing not only petitioner's participation in the murder of his wife, but that he planned and cold-bloodedly carried it out in such manner as to attempt to make her death appear to have been caused by accidental means from a cut or insect bite. The evidence, independent of his confessions, goes so far as to establish that petitioner, when he deemed the means thus employed by him too slow in causing death, resorted to a more certain and speedy method by drowning the deceased and disposing of her body in a manner which would still indicate that the cause of death was accidental.

We do not have here, as in the *Wan*, *Brown* and *Chambers* cases, *supra*, a situation where the only evidence of the guilt of the accused is his own confession wrung from him by torture. We do not have a case where there would have been no justification for the finding of guilty except for use of a confession, but we have a case in which all of the evidence so enmeshed the petitioner in the toils of his own making that his guilt appeared inescapable. Before he confessed he was confronted by some of the witnesses against him. (R. 198, 445, 446.) As shown

by the terms of his own confession, he realized the strength and weight of the proof of his guilt, and we submit that the conclusion is almost inevitable that the only reason he confessed was because he believed that by so doing he could "get even" with his accomplice whose weakness in "squealing" had brought the crime upon petitioner's own head.

We particularly direct the Court's attention to these circumstances because it appears to respondent, as heretofore pointed out, that all the decisions of this Honorable Court, rejecting the use of confessions obtained by compulsion, point out the fact that the confession was the sole or principal evidence against the defendant. It further appears to respondent, in that particular, that this case is clearly distinguishable from those cases. The instant case does not present a situation where a defendant whose guilt was not otherwise established was convicted solely by evidence of a confession wrung from him while he was dominated and his mind subjugated by the officers of the law and others. To the contrary, it presents a situation where the guilt of petitioner was established by evidence independent of his confessions and where petitioner seeks to escape the just punishment for his brutal crime by falsely claiming that the confessions, which were part of the proof against him, were obtained by brutal and coercive methods.

We respectfully submit that the facts here do not present such a case as will appeal to this Honor-

able Court as coming within the prohibition of the Fourteenth Amendment.

The petitioner was arrested, lodged in jail, and later confronted by his accuser. He confessed at a time and place and to persons of his own choosing, and without compulsion. No picture is here presented of a tortured victim. No confession was extracted by means comparable to those employed in the Middle Ages, or by means condemned by this Honorable Court or by any other court within our knowledge.

Before petitioner was arraigned on the incest charge and the murder charge, he had had the advice of counsel. During the time he was in jail, before he confessed, he had had the advice of counsel. He had the advice, cooperation and assistance of three skilled lawyers during his trial. Every point which could be suggested in his defense was suggested. Every bit of evidence which could be adduced on his behalf was adduced. The trial lasted for weeks. The arguments consumed days. There was no rush to get to trial. No public clamor for petitioner's life. His trial was public. All of the safeguards of the Constitution of the United States which can be placed about a person accused of crime were placed about him. His case was considered by a jury of his peers. It was again passed upon by the trial judge on motion for new trial. It was twice considered by the Supreme Court of the State of California. The contrast between this

case and those cited by the petitioner is so great that it would appear scarcely necessary to point out the differences in the situations. In most of those cases race prejudice or mob spirit was involved, a hasty bringing of the accused to trial, no opportunity for preparation, and the trial was short and followed by an immediate verdict—all in a hectic atmosphere of racial prejudice and mob spirit.

None of those factors is involved in this case. We therefore earnestly submit that the instant case does not come within the principles stated in the *Wan*, *Brown* and *Chambers* cases, *supra*, or in any other case decided by this Court, but submit that the evidence shows most satisfactorily that petitioner had a fair and impartial trial; that his confessions were the result of his own voluntary acts, not brought about by anything except his own desire to tell of his criminality in a light most favorable to himself. As was pointed out by the Supreme Court of California in its decision, 94 Pac. (2d) 569, 579, in the following language:

> "A reasonable conclusion, and one which the trial court and jury might have readily reached on all the evidence, is that the defendant broke down and confessed his participation in the crime only after his confederate and accomplice had been arrested and detailed the murder conspiracy and had been brought face to face with the defendant who had been informed of the details of his confederate's story. Each case must turn on its own facts and we therefore give

but passing mention to the authorities relied on by the defendant."

It thus appears that the due process clause of the Fourteenth Amendment of the Constitution of the United States was not infringed by admitting in evidence the confessions made by petitioner.

II. THE FOURTEENTH AMENDMENT WAS NOT INFRINGED BY THE PRODUCTION IN COURT, THE RECEIPT IN EVIDENCE, AND EXHIBITING TO THE JURY CERTAIN RATTLESNAKES

Petitioner makes the point that the bringing of two live rattlesnakes into the courtroom and exhibiting them to the jury was so inflammatory and frightening in its nature as to make of the trial a mock and sham and violate the fundamental guarantee of due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States.

Respondent's position is that the bringing of the particular live rattlesnakes into the courtroom for inspection by the jury as exhibits in the case was as a matter of law proper and as a matter of practical trial procedure an almost necessary thing to do. The snakes were brought into the courtroom in a quiet and orderly manner, were kept there only for the length of time necessary for their identification as exhibits in the case and for inspection by the jury and thereafter and as soon as practical they were quietly removed from the courtroom. This was done

without any unnecessary histrionics and under conditions which enabled the jury to observe the rattlesnakes for their evidentiary value. The jury were not inflamed or frightened. Before being exhibited to the jury the rattlesnakes had been positively identified as being the identical snakes which were purchased by Hope at petitioner's direction for the purpose of killing Mary James. One of them had actually been used in an attempt to murder her, and its bite was a contributing cause in her death.

In order that the competency and relevancy of the rattlesnakes as evidence may be apparent, and the circumstances and incidents of bringing them into court may be shown to have been unemotional, quiet and orderly, we purpose first to review the authorities dealing with the subject of the admissibility of "real" or "demonstrative" evidence in a case analogous to the instant case, and secondly, to review the facts showing the relevancy and materiality of these particular rattlesnakes as evidence, and all of the circumstances under which they were produced.

1. The Law With Reference to "Real" or "Demonstrative" Evidence

The Code of Civil Procedure of the State of California provides as follows:

> "Section 1954. MATERIAL OBJECTS. Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such

object may be exhibited to the jury, or its existence, situation, and character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the court."

Pursuant to this code section, it has been held in California to be permissible to introduce in evidence numerous physical objects, including the instruments with which the crime was committed, weapons and bullets, wearing apparel of the victim of the crime, clubs, knives, and similar objects.

8 Cal. Jur. pp. 140-145.

The California rule is in consonance with the general rule throughout the United States. In Jones Commentaries on Evidence, Second Edition, Volume 3, page 2518, the rule is stated as follows:

"At this date there is no longer serious doubt either as to the admissibility or importance of what is called 'real' evidence. We have already defined the term, which is sometimes valid to 'immediate' or 'demonstrative' evidence, or 'autoptic preference'.

"For obvious reasons there is no class of evidence so convincing and satisfactory to a court or a jury as that which is addressed directly to the senses of such court and jury."

At page 2520 the same author states:

"The right to use real evidence scarcely needs authority to support it. It is true that evidence for the most part is by the oral testimony of witnesses and by documents, but when the thing testified to can be seen by the jury, subject always to the control of the presiding judge,

consistency demands that if the ends of justice can be furthered by its production, it should be produced."

Wigmore, in the Second Edition of his work on Evidence, Paragraph 1157, deals with the subject in part as follows:

"The autoptic preference to the jury of the weapons or tools of a crime, or of the clothing or the mutilated members of the victim of the crime, has often been objected to on grounds of Undue Prejudice."

After a discussion of some of the cases dealing with the subject, the author continues:

"The objection thus indicated seems to be twofold. First, there is a natural tendency to infer from the mere production of any material object, and without further evidence, the truth of all that is predicated of it. Secondly, the sight of deadly weapons or of cruel injuries tends to overwhelm reason and to associate the accused with the atrocity without sufficient evidence.

"The objection in its first phase may be at least partly overcome by requiring the object to be properly authenticated, before or after production; and this requirement is constantly enforced by the Courts (post, Sec. 2130).

"The objection in its second phase cannot be entirely overcome, even by express instructions from the Court; but it is to be doubted whether the necessity of thus demonstrating the method and results of the crime should give way to this possibility of undue prejudice. No doubt such

an effect may occasionally and in an extreme case be produced; and no doubt the trial Court has a discretion to prevent the abuse of the process. But, in the vast majority of instances where such objection is made, it is frivolous, and there is no ground for apprehension. Accordingly, such objections have almost invariably been repudiated by the Courts."

In a footnote to the foregoing, Professor Wigmore has appended a citation to numerous cases from England and most of the states of the United States dealing with the subject matter. An examination of this footnote, to which reference is hereby made, will show that not only were the clothing worn by numerous victims showing bullet holes and victims' blood received in numerous cases but also that weapons such as guns, pistols, cartridges, hatchet, knife, razor, and other weapons exhibited to juries, and that also photographs of the wounds of the victim and of the victim's body, showing the character and position of wounds, were admitted in evidence; also, that such matters as the skull of the deceased victim, the severed head of the deceased victim preserved in alcohol, the neck of the mutilated deceased person said to have been strangled, were among those real objects which were received in evidence.

Innumerable cases could be cited showing various applications of the rule to numerous cases. However, the foregoing indicates the respondent's position with reference to the legal right to pro-

duce any "real" evidence which is relevant to the issues involved in the case. The California case of *People* vs. *Green*, 13 Cal. (2d) 37, 42, 43, is a typical case in point.

In order that the relevancy of the two rattlesnakes which were produced as evidence in the instant case may appear, we recite the facts in relation thereto as shown by the record.

2. The Rattlesnakes Were Identified as Instruments Used in Accomplishing the Murder

The witness Hope testified that petitioner told him to get "some fighters" (R. 70); that Hope thereupon went to "Snake Joe" and got two snakes, which he put in two boxes, one in a glass box and one in a small box with a screen door on top. He put the boxes containing the snakes in James' car and then met James, who took the car, letting Hope out of the car at Beverly and Vermont streets after telling Hope that he (James) was the one who was going to use the snakes, that his wife had five thousand dollars worth of insurance which he was going to collect (R. 70-72); that on the following day at about 12.30 or 1.00 o'clock p.m., Hope arrived at the residence of James (R. 72-73), at which time the snakes were in the boxes in the garage. (R. 73.) After Hope had been in the garage about ten minutes James stated to him:

> "'You are in this thing just as deep as I am. You have bought these snakes all over the country. I have had you out here at the house.

> Different people have seen you.' . . . 'Now bring that box in the house.'"

Hope then walked ahead with the glass-topped box with the snake in it. James followed him. They entered the house. (R. 73-74.) James held the screen door open. Hope went through the back door into the kitchen. James passed Hope and, as Hope testified:

> "Mrs James was lying on the breakfast table with a piece of adhesive tape over her eyes and over her mouth. He went ahead of me, raised her foot up so I could get by, pointed to where I was to set the box on the seat of the breakfast table, which I did. In setting that down the top flew back. He put her foot in the box. After he closed the box I took the box back to the garage." (R. 74-75.)

"The snake was in the box, and was alive." Mrs. James was in her nightgown. Her legs were bare and her left leg was put into the box. (R. 75.)

Hope further testified that later the same day he took James' car, took the boxes with the snakes and returned the snakes to the man from whom he had bought them (R. 76); that thereafter he threw the boxes away; that he returned to James' house at about 1:30 o'clock the following morning (R. 76-77); that at that time James was in the garage; that after having a couple of drinks James said to Hope: "Those snakes are no good either. My wife is not even sick." Hope said: "Why don't you take her to the hospital?" James said: "No.

they will string us both higher than a kite." James then jumped up and said: "I am going in and drown her." (R. 78.) At 4.00 o'clock James came out of the house and said: "That is that." At about 6.30 or 7.00 o'clock James came out to the garage and said:

> "She has been dead since 4:00 o'clock. The house is all cleaned up and you will have to go in and help me carry it out." (R. 78.)

Hope then went into the house, saw the dead body of Mrs. James lying on the floor in the hallway near the bathroom door and assisted James in carrying her out to a point alongside the fish pond. He refused to assist James in putting her into the fish pond and went back to the car, where he was later joined by James. (R. 78, 79.)

The witness Houtenbrink (commonly known as "Snake Joe"), testified that on August 3, 1935, he sold two diamond-back or Crotalus Atrox rattlesnakes to Hope for $3. (R. 201-203), which Hope put into a "glass bottom box" and took away with him (R. 203); that on the next day, August 4th between 2.00 and 3.00 o'clock in the afternoon, he rebought the same snakes from Hope and paid him $1.50 therefor. (R. 204.) He further testified that he still had those snakes, the identical snakes which he had sold to and rebought from Hope, and that they were in the court room. (R. 204-206.) He then, accompanied by counsel for defendant, stepped over and examined the contents of a box

covered with burlap cloth which had just been brought into the court room. He stated that he recognized the contents as being two rattlesnakes, which were the same snakes which he had sold to Mr. Hope and which Hope had returned to him. (R. 205-206.)

Previously Dr. Boehme, a witness called for the people, had testified to his examination of the exhumed body of Mary James, and had there discovered that the base of the great toe on the left foot had a laceration wound approximately a quarter of an inch in length; that the left leg was marked, discolored and swollen from the knee to the hip, almost mahogany in color; that he had formed an opinion that the wound, discoloration and swelling were of such a character as probably to have resulted from the woman's toe having been bitten by some venomous creature, probably a snake; that all other findings on the leg were compatible with that opinion, and that the wound was of such character as could be caused by snake fangs striking at an angle. (R. 109-111.)

Dr. Wagner, the autopsy surgeon, testified that upon his examination of the body of Mary James he found, among other things, a laceration on the plantar surface of the left great toe and the left foot considerably swollen; the lungs containing considerable amount of water; no disease of any of the vital organs; the uterus showed a normal pregnancy of about six weeks; superficial bruises of varying

extent in various parts of the body; chemical analysis of the stomach, liver and kidneys showed no poison; that in his opinion the cause of death was drowning and an acute cellulitis of the leg. (R. 93-94.) He further testified that cellulitis might be caused by bacterial infection or animal poison; that the venom of insects, snakes, etc., caused acute cellulitis (R. 95-97); that the type of cellulitis found in the body of Mary James could have been caused by the bite of a rattlesnake (R. 97), and that he reached the conclusion from the punctured wound that it could have been made by the bite of a rattlesnake. (R. 99.)

3. The Rattlesnakes Were Relevant to the Issues and Admissible as Part of the Res Gestae

It will thus be seen that before exhibiting the snakes to the jury, it had been established that the victim, Mary James, bore upon her body a wound and a cellulitis of a type that could be produced by the bite of a rattlesnake. It had been testified positively by the petitioner's accomplice in the murder of Mary James, that the snakes had been purchased for the purpose of killing her, and that her bare foot had been thrust into a box containing one of these snakes. It had been established by the testimony of "Snake Joe" that two live rattlesnakes had been put into the possession of the witness Hope on the 3d of August and had been returned by him on the 4th of August. The snake which had been in the

box when Mary James' bare foot was thrust into the box had been identified by Hope as one of the two which he bought from "Snake Joe" and later returned to him, and "Snake Joe" unequivocally identified the snakes in the box in the court room, (which had not yet been exhibited to the jury), as the identical snakes which had been delivered to Hope and returned by Hope. Under the evidence both of these snakes had been purchased to be used in the killing of Mary James, and one of them had actually been used in attempting to kill her. Consequently, as to the matter of the identification of the snakes and their relevancy, it would appear clear that they were adequately and unequivocably identified as the instrument used in the course of an effort to kill Mary James, and consequently under the authorities herein cited, were relevant as evidence.

We can not refrain from stating an analogous case. Let us suppose that a defendant is accused of killing his victim and that it is shown by the evidence that he first struck the victim over the head with a hammer and that the victim fell wounded. Thereafter, the victim not having died, it is shown that the defendant shot him in the head with a revolver, the shooting producing instant death. The autopsy surgeon gives the cause of death as a gunshot wound with fracture of the skull caused by a violent blow with a hard object as a contributory cause of death, and states in his opinion such a blow as that which

caused the fracture could have been produced by a hammer. Can it be doubted that under such circumstances the hammer, identified as having been found by the side of the victim, bearing human blood, would be admissible in evidence as relevant to the issue as to the manner in which death was effected?

Under the laws of the State of California the jury in a homicide case have several duties to perform:

First: To determine who committed the homicide.

Second: To determine whether the homicide was manslaughter or murder.

Third: To determine whether, if murder, was murder of the first or second degree. In determining this latter question the jury have a right to consider whether the murder was premeditated, whether it was the product of an abandoned and malignant heart on the part of the defendant, or whether it was effected by means of poison or torture; because if it was premeditated or it did proceed from an abandoned and malignant heart, or was effected by means of poison or torture, it is murder of the first and not of the second degree.

Fourth: Having determined it to be murder of the first degree, the jury have a right and a duty to determine whether the murderer shall suffer life imprisonment or death as punishment for his crime. This matter is left entirely to the discretion of the jury, and is a matter to be determined by them in view of all of the circumstances connected with the

murder. Obviously, a murder produced by cold-blooded torture by a man who tries one means, and upon its failure, then resorts to another in his determination to kill, would be treated as to the penalty in a different way from a murder less atrocious in the manner of its perpetration. It certainly can not be said that nothing is proved by the production in court of an instrument used in, or acquired for, the perpetration of a murder. The type of instrument may well indicate the character of the crime intended. Certainly, the fact that a poisonous rattlesnake was used in an effort to perpetrate this particular murder shows a heartlessness, cold-bloodedness and willingness to torture that is almost inconceivable. These are circumstances which should have considerable weight with the jury in determining the several questions which it is their duty to determine in reference to the culpability and punishment of one accused of murder.

It certainly may well be doubted whether the mere statement by Joe Houtenbrink that he still had the same snakes which had been sold to and returned by Hope would have been believed by the jury; whereas, when the actual snakes were produced in court, with Houtenbrink's identification thereof, the jurors were unquestionably more likely to believe his testimony, and that of Hope, than they would have been if the snakes had not been produced. It is axiomatic that where the prosecution shows the crime to have been committed by

some instrument or other physical object and fails to produce the same at the trial for the inspection of the court and jury, the defense may argue vehemently that the evidence of the prosecution falls by its own weight because if such an instrument or object was used, the prosecution would have produced it.

Furthermore, we believe that a trial prosecutor who was able to but did not produce the rattlesnakes in question in the instant case, would be open to severe criticism for lack of fairness to the defense.

4. No Prejudice Was Suffered by Petitioner from the Manner of Producing the Snakes

We come now to the manner of the bringing of the rattlesnakes into the courtroom, and the alleged circumstances of an inflammatory and frightening nature. The first thing that transpired with reference to the rattlesnakes being brought into the courtroom was a statement made outside the presence of the jury by Mr. Clarke, one of petitioner's counsel, who stated that he understood the district attorney intended to bring the snakes into the courtroom, and that he did not consider them admissible in evidence; he considered the bringing of the snakes into the courtroom would be highly prejudicial to the case, and there would be no other purpose than just to excite the passions of the jury. (R. 200-201.) The Court indicated that it

would treat this statement as an objection and would deal with the matter when it arose.

The next thing that appears in the record is that after the witness Joe Houtenbrink had stated that he still had the identical snakes involved in the case, he was asked:

> "Q. Are they in here in the court room?
>
> "A. If I can see them I will tell you if they are here, yes sir." (R. 204.)

Whereupon the following occurred: (R. 204-205.)

> "Mr. Williams: Will you produce that box?
>
> "Mr. Clark: If the Court please, I object to the witness leaving the stand for the purpose of looking at the box that has been brought into the courtroom, or for any other purpose. I object to any snakes being exhibited or introduced into this case. I think this is an appropriate time for me to ask your Honor either by statement of your Honor or some appropriate means to make it appear in the record that two men have just entered the courtroom carrying a box covered with a burlap cloth, and upon their coming down the aisle, the people who were in the courtroom, filling the courtroom, manifested excitement, that several of them rose from their seats, that the attention of spectators and the jury were directed away from the testimony of the witness that at the time I am speaking there is upon the faces of the audience an appearance of anxiety and consternation not heretofore exhibited during this trial.

"The Court: The Court has no knowledge that there was any such manifestation on the part of the audience. The Court is unable to state whether the attention of any person was diverted or not, nor is there anything to indicate the apprehension that your statement implies; at least, it has not been seen by the Court.

"Mr. Clark: In other words your Honor has no knowledge that the statement I have made is correct?

"The Court: No. That may be your frank, honest opinion as to the facts, however, the Court has not seen any such situation.

Mr. Clark: I will try to find appropriate means of putting those facts in evidence. I think that they are facts and that my statement is appropriately made at this time.

"The Court: So far as the physical facts of the two men having taken the box in from the courtroom door and passed up the aisle between the two groups of spectators, through the gate into the inner part of the courtroom and deposited the box by the side of the bench, the record may show that that did occur."

The objection above mentioned was overruled and the witness accompanied by Mr. Clark, the attorney for the petitioner, stepped over and examined the contents of the box, after which the witness identified the snakes as being the identical ones described in his testimony. (R. 206.) Thereafter the snakes were offered in evidence but were marked for identification only. (R. 206.) Thereafter the witness Houtenbrink was subjected to extensive cross-exami-

nation (R. 206-212), at the conclusion of which the snakes were again offered in evidence and received. (R. 212.) Whereupon the box was placed in a position where the members of the jury could and did observe the snakes. (R. 212-213.) After the jurors had observed the snakes, by stipulation the snakes were removed from the courtroom. (R. 213.)

It will be noted from the foregoing that, although counsel for the defendant claimed that there had been some excitement manifested in the courtroom at the time the burlap covered box containing the snakes was brought into the courtroom, the Court expressly stated that he had no knowledge of any such manifestation, or that the attention of any person was diverted. The Court stated as a matter to be shown by the record that two men had brought the box in through the courtroom door, passed down the aisle between the two groups of spectators toward the gate into the inner part of the courtroom and deposited the box by the side of the bench.

This is all that happened. Thereafter the jurors were permitted at an appropriate time to inspect the snakes and the snakes were removed from the courtroom.

There is absolutely no evidence to the effect that any person, either on the jury or off the jury, was in the slightest degree frightened or agitated either by the presence of the snakes or the manner of bringing them into the courtroom. There isn't anything inherently terrifying in the

sight of snakes in a glass enclosed box. It is a matter of common knowledge that men, women and children pay five or ten cents for the privilege of seeing snakes in snake pits and side-shows. It is a matter of common knowledge that caged snakes are on exhibition in zoos attached to public parks in practically every city in the United States and men, women and children congregate before these cages, observe rattlesnakes in their cages and, unless prevented by attendants, try to tease the snakes into rattling and striking. All these things are matters of common knowledge. It is true that almost everyone is afraid of a loose rattlesnake in the mountains or on the desert because of the fear of being bitten, but that fear does not extend to a properly caged rattlesnake where there is no possibility or danger that anyone may be bitten by it. In fact, in our own judgment the sight of a caged live rattlesnake is much less horrible, much less apt to cause nausea or inflame passions than the sight of a hammer or axe with blood of the victim thereon, or the sight of a bullet which has pierced the victim's heart and been extracted by the surgeon, or the sight of bloodstained clothing of the victim, or of strands of the victim's hair, or bones, or morgue pictures of the victim showing the effect of wounds, or cuts or blows upon the body; all of which are customarily introduced into evidence without particular comment.

The fact is that the object, whether it be a blood stained hammer, a bullet, a bone, pieces of hair, or a rattlesnake, is not of itself a thing to inflame anyone's passions, or which affects his calm judgment. The thing which arouses emotion is the act of murder. When that act is accomplished by means of torture, or cruelty of exaggerated or vicious character the recital of the details of such killing will produce horror or arouse emotion. If the particular defendant is shown to have been the perpetrator of the murder, its cruel or brutal character should and will count against him. It is the thing which the defendant did which may impassion the jury, but certainly not the mere sight of some physical object from which the jury may get perhaps a clear idea of exactly what he did do.

It is, of course, possible that rattlesnakes, or any other object connected with the commission of an atrocious murder, might be brought into court and handled in such a sensational or spectacular way as to produce an improper effect. Such, however, was not the manner in which the rattlesnakes were brought into court in this case. As the record shows, the whole proceeding was calm and dispassioned. The snakes, after having been identified, were withheld from the sight of the jury until petitioner had had an opportunity to cross examine the witness, Joe Houtenbrink, by whom they were produced, so that in case his identification was deemed insufficient after cross exam-

ination the snakes would not have been shown to the jury. All precautions were taken to make the matter as little spectacular as was possible. We apprehend that no serious view can be taken to the effect that such conduct deprived petitioner of due process within the meaning of the Fourteenth Amendment of the Constitution of the United States.

5. Petitioner Waived Any Claim of Prejudice by Again Producing the Snakes and Exhibiting Them to the Jury

It may be stated emphatically that all of the furor attempted to be made by petitioner about these rattlesnakes is nothing more or less than an attempt on the part of lawyers to make something out of nothing. We positively state that neither the lawyers, nor the petitioner, nor the jurors were in the slightest bit agitated by the snakes being brought into the courtroom. The petitioner did not feel that the presence of the snakes in the courtroom was injuring him in any way, or inflaming the jury against him. We make this positive statement for the reason that, after the snakes had been removed from the court room, where they had remained for a few minutes and only for the purpose of identification and inspection, they were at the request of petitioner as part of his defense returned to the court room and kept before the jury as exhibits for a

considerable length of time while counsel for the defense interrogated their own witnesses as to the life and feeding habits of rattlesnakes and their methods of striking and killing. (R. 691-697.)

Surely, if petitioner had had the slightest idea that the jury was being inflamed against him by the sight of the snakes, he would not have permitted the exhibition which his counsel voluntarily made of them after their removal by the district attorney.

The Supreme Court of the State of California carefully considered this point and finally reached the conclusion which is expressed in the following language quoted from the opinion (R. 956.):

> ". . . In view of such identification of the snakes and their employment in the plan to bring about the death of deceased, we perceive no error in the trial court's ruling permitting the production of the snakes for the inspection of the jury. It is not uncommon upon a murder trial to offer in evidence as part of the res gestae the medium employed to bring about the violent or untimely death of the victim. In *People* v. *Bannon*, 59 Cal. App. 50, 56, it is stated that 'As a general rule physical objects which constitute a part of the transaction, or which serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under judicial investigation.' (See, also, *People* v. *Peete*, 54 Cal. App. 333, 348, and 8 Cal. Jur. 143, Sec. 228.) Moreover, the production of the identical snakes

tended to corroborate the testimony of prosecution witnesses and to otherwise support the case of the People. It might also be mentioned that if the production of the snakes in court caused the extreme state of excitation urged by the defense, it is difficult to appreciate why defense counsel at a later time in the trial and during the development of the case by the defense, again produced the snakes and thus risked a repetition of the situation of which complaint is here made."

6. The Affidavits on Motion for New Trial

What has heretofore been said with reference to the matter of the rattlesnakes is from the record of the trial itself. On motion for new trial, however, the defendant filed two affidavits in which reference was made to the incident of the bringing of the rattlesnakes into the courtroom. The affidavit of R. E. Parsons, one of the counsel for the petitioner, sets forth the circumstances substantially as stated by the court at the time of the incident with the exception of the fact that affiant Parsons claimed that he could hear the rattle of the snakes. (R. 822-823.) The affidavit of William J. Clark, another of the attorneys for the petitioner, seeks to dramatize and overemphasize the incident. He says:

"The snakes were alive and sounding their rattles. A wave of terror—I can find no other language more accurate—swept through the court room. Spectators rose from their seats,

Some nearest the aisle shrank away. Many uttered exclamations of fright." (R. 828.)

He then quotes certain hearsay excerpts from various newspaper articles containing much intemperate language which sought for the benefit of their readers to dramatize the incident. (R. 828-830.)

These affidavits on behalf of the petitioner were met by the affidavit of Eugene D. Williams, a deputy district attorney who participated in the trial on behalf of the people, which affidavit recited the facts with reference to the identification of the snakes, and stated that while said affiant was in the courtroom at the time the snakes were brought in, there was not to his knowledge any wave of terror or exclamations of fright, or any extraordinary or unusual commotion among the spectators, and none among the jurors. This affidavit also points out that the whole matter of bringing the snakes into court was done in an unostentatious way, and points out that the snakes were brought into court a second time at the instance of the petitioner himself. (R. 1116-1117.)

The trial court had these affidavits before it at the time of the motion for new trial. There was a conflict in the evidence as shown by the affidavits with reference to the degree and character of the effect produced in the courtroom by the bringing in of the snakes. The trial judge also had his own knowledge and recollection of what had actually

happened. He decided that no prejudice had resulted to the defendant from either the fact of the bringing of the rattlesnakes into the courtroom or the manner in which they were brought. It would appear under recognized rules that his decision in that matter as to which he had firsthand personal knowledge, should be conclusive. At least it can undoubtedly be stated that there being a conflict not only in the facts themselves but in the conclusions to be drawn from the facts with reference to the effect, if any, produced upon the jury by the rattlesnakes, that the court was not guilty of any abuse of discretion in determining, as it did, that no real prejudice had been suffered by the petitioner of such a character as to warrant the granting of a new trial.

For the foregoing reasons it is respectfully submitted that the bringing of the rattlesnakes into the courtroom, in view of their obvious relevancy as evidence, in view of the manner in which they were produced, in view of the fact that the petitioner himself had them again brought into the courtroom for the purpose of again exhibiting them to the jury, could not be said to have created such an inflammatory condition as to make the trial a "mock and sham" or to violate the requirements of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

III. PETITIONER'S RIGHTS, GUARANTEED BY THE FOURTEENTH AMENDMENT, WERE NOT VIOLATED BY THE INTRODUCTION IN EVIDENCE OF THE CIRCUMSTANCES SURROUNDING THE DEATH OF A FORMER WIFE OF PETITIONER

1. Evidence Relative to the Death of Winona James in Colorado

For a number of years prior to 1932, C. A. Pries, an agent for the Prudential Life Insurance Company, frequently visited the barbershop of James, located in downtown Los Angeles, for the purpose of interesting James in life insurance, who at the time had a policy in some insurance company. The barbershop was in the center of Pries' territory. During this period of time James had suggested to Pries names of persons who might possibly be interested in insurance. About April 25, 1932, James told Pries that he might soon have a prospect for him. (R. 398, 399.)

On May 20, 1932, James introduced Pries to Winona Wallace (R. 401, 402), who had been a bookkeeper for the Howard Automobile Company. (R. 759.) Two days prior to this, James had told Pries to come to his home at 7 o'clock in the evening of May 20th, and he would have a prospect for him. (R. 401.) On the evening of May 20th, James, after introducing Pries to Winona Wallace, gave Pries an application for a $5,000 policy on his own life and suggested that Miss Wallace take a

like amount of insurance on her life, whereupon Pries received an application from her for a $5,000 policy. (R. 402.) James told Pries that he and Winona were to be married within a month or two and inquired of Pries if he could be named the beneficiary in her policy. Pries informed James that he had no insurable interest but that after marriage, if she consented, the beneficiary could be changed. (R. 403.) When the policies were issued, the policy of Winona Wallace carried double indemnity. (Exhibit 62.) James carried the $5,000 policy on his own life for only three months. (R. 1106.)

Sometime between the issuance of the $5,000 policy, above mentioned, to Winona Wallace and July 25, 1932, when an affidavit for change of beneficiary was sworn to, James and Winona became husband and wife. (Exhibits 62 and 71.) On August 2, 1932, two additional policies in the amount of $1,500 each were written by The Policy Holders Life Insurance Association on the life of Winona James, nee Winona Wallace. (Exhibits 66 to 70, inclusive.) She had carried a $1,000 policy of life insurance in the Kansas City Life Insurance Company for about eight years and her sister was named beneficiary therein. (Exhibit 71.) They borrowed $150 on this policy (R. 753) and with this money, which was all James had, they went on a honeymoon trip and drove to Colorado. (R. 728, Exhibit 63.) While there James and Winona, on September 21, 1932, drove to the top of Pike's

Peak. (R. 325, 724.) At about 7 o'clock, p.m., on said day, James appeared at Glen Cove, which is about seven miles from the top of the mountain, and told J. D. Rogers, superintendent of Pike's Peak Auto Highway, a privately owned road, that he had had an accident up the road but didn't know whether the automobile was badly damaged. (R. 253, 254, 255, 265, 266.)

Pike's Peak Auto Highway was unpaved but in good condition for traffic. (R. 254, 302.) James' car was the last one on the grade that evening, all other cars having checked out. (R. 289.) At the time James told Rogers about the accident, there was nothing wrong with James' clothing, they were neat and no dirt on them. (R. 267, 268.) Rogers drove to the place of the accident with James and two other men in a truck. (R. 266, 267, 313.) The accident occurred about two miles up the grade from Glen Cove. (R. 271.) While driving to the scene of the accident, James told Rogers that at the time of the accident his wife was driving the car and he was looking across the valley through field glasses. Rogers remarked to James that at that time of the night not much could be seen with field glasses, whereupon James said, "I really don't know how it happened." (R. 268, 269.) Rogers asked James how he got out of the car and James stated that he went over in the car for about fifty feet and then jumped. Rogers remarked to him that he must have made a perfect landing, whereupon James replied

that he didn't know, and that he had fallen. (R. 270.)

The truck was stopped on the road 150 feet below where James' car had left the highway. (R. 274, 277, 312, 313.) Rogers observed James' car, which was a Studebaker coupe, standing on its wheels, headed down hill and against a rock about 150 feet below where the car had left the highway. (R. 275-278, 311, 312, 724.) The left front wheel was broken and against the rock. The windshield was shattered. (R. 314, 315.) Winona was lying on the ground on the right-hand side of the car with one or both feet on the running board, and her head was down hill. Her clothing was smeared with blood and there was blood on the seat cushion and on the back of the seat on the right-hand side of the car. (R. 278, 279.) On the floor of the car was one lone tool, a hammer, with blood all over it, and there was a small blood stain on the floor near the hammer. (R. 279.) Also in the car were some bottles, one of which was one-third full of liquid of the color of whisky and which had an alcoholic odor, and the bottle bore a label of a Mexican brand of liquor. (R. 284.)

When Rogers knelt down on one knee to see whether Winona was dead or alive, he listened to her breathe and smelled a "pretty strong" odor of liquor upon her breath. (R. 279.) However, he detected no odor of liquor on the breath of James. (R. 285.) An ambulance was called and when Rogers lifted Winona he felt a softness about her head in the region of one of her ears. The ambulance

was parked on the road below the place where James' car had stopped against the rock and Winona was carried down hill to the ambulance. (R. 280.)

After Winona was taken away in the ambulance and before anyone was permitted on the road where James' car had left it, Rogers made an examination of the road in the vicinity of the switch-back where the accident occurred. Rogers directed the two men with him to stay off that portion of the road because he wanted to investigate the tracks of the car. Upon investigating these tracks he found a man's footprints which started about eighty feet back from where James' car left the road. At that point the footprints went from the left side of the car around in a circular manner to the right side and then returned in the same manner to the left side and from that point followed the automobile tracks continuously for a distance of eighty feet to the point where the automobile left the roadway. (R. 280-284, 287, 288.)

Winona was taken in the ambulance to the Beth-El Hospital in Colorado Springs where on September 21, 1932, X-ray pictures were taken of her head. (R. 385-389.) There was one wound over the right eye and one under the hair in back of the ear. (R. 326.) It was the opinion of Doctor Decker that the fractures were caused by a moderately light blunt instrument driven rapidly against the head, such as a hammer in a human hand could strike. (R. 539, 540.) Winona was operated on,

following which she began to recover from her injuries and walked before she left the hospital on October 8, 1932. (R. 325, 326.) While Winona was in the hospital, James was asked by the bookkeeper of the hospital how he would be able to take care of the hospital expense, and James said he had no means of taking care of it at the time but was going to negotiate a loan on an insurance policy. (R. 390.) Later, he borrowed $100 from Winona's father who came there from North Dakota upon being notified by James of the accident. (R. 728.)

James told Alva E. Custer, manager of the hotel in Colorado Springs where James lived while Winona was in the hospital, that he was more or less destitute of funds due to the accident, that he was going to take Winona to Manitou Springs, that there was no further use of going into debt, that she was all right, that he could take care of her as he had nothing to do, and that the doctor had cautioned him and Winona about stooping over because of causing dizziness, also against washing her hair which might cause infection in the head wound. (R. 380.)

James rented a cottage at Manitou Springs, which is about six miles from Colorado Springs, and took Winona to this cottage. (R. 383, 729.) Manitou Springs is a summer resort and the nearest occupied cottage to the one rented by James

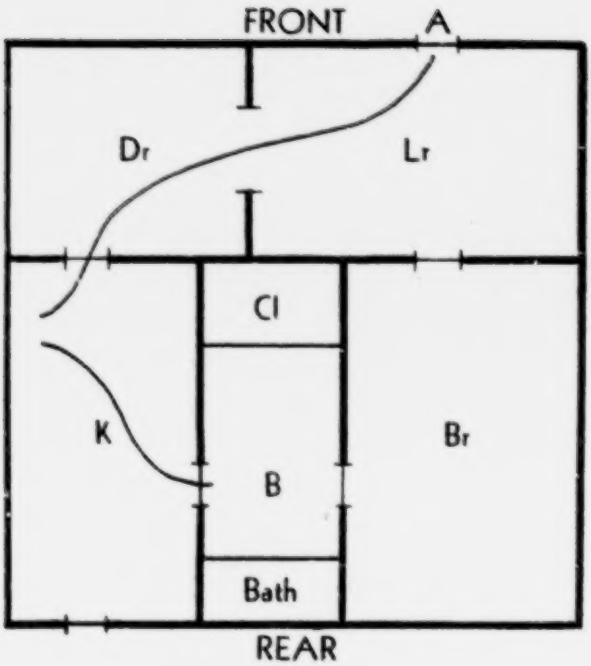
was about half a block away. (R. 339, 340, 351.) James obtained food supplies from Leonard's Grocery Store located about one mile from the cottage and on one or two occasions, he rode on the grocery truck with Gerald Rogers, while the latter delivered groceries to the cottage. (R. 352.) Gerald Rogers was a married man, 28 years of age, and was employed in Leonard's Grocery Store. (R. 339, 351, 360.)

Every day, except on the day previous to the death of Winona on October 14, 1932, Miss Grace Yarnell, a cousin of Winona and who lived at Colorado Springs, visited Winona at the cottage. On each of these visits, Winona was sitting up in bed and did not appear to be dizzy or faint. (R. 323, 326, 327, 328.) While Winona was in the hospital, Miss Yarnell took James about the city and to the hospital in her car. (R. 334, 335, 748.) On two occasions, while they were alone in the car, James attempted to kiss her and on another occasion when she was in his room at the hotel, he made advances toward her, whereupon she told him to "cut it out." (R. 330, 331.)

On October 14, 1932, shortly after lunch, James appeared at the hotel in Colorado Springs, and Alva E. Custer inquired of him the condition of Winona's health. James stated that he regretted leaving her alone at the cottage and that he had come to town to see if word had been left at the

hotel from his insurance company and thought that word might have been left there for him, as he had applied for a loan. James left the hotel about mid afternoon. (R. 379, 380, 383.) There was a bus line between Manitou Springs and Colorado Springs on ten-minute schedule, also a taxicab service. (R. 447.)

James testified that he went from Manitou Springs to Colorado Springs on a bus that day and, according to his own testimony, was back in Manitou Springs at about 4.30 o'clock that afternoon. (R. 729, 730.) James had sold his wrecked car for $25. (R. 384.) He appeared at Leonard's Grocery Store "somewhere around" 5 o'clock, ordered groceries, and asked Rogers to let him ride on the truck when he made the delivery. Shortly thereafter the groceries were delivered. (R. 341.) Upon arriving at the cottage, James and Rogers entered the front door together, James proceeding through the living room to the bedroom and Rogers proceeding through the living room, dining room and to the kitchen where he deposited the groceries. The floor plan of the cottage was described by Rogers as indicated by the following drawing and as per Defendant's Exhibit K (R. 341, 342, 343.):



The following letters indicate the following rooms:

LR—Living Room
DR—Dining Room
K—Kitchen
BR—Bedroom
Cl—Closet
B—Bath

The short parallel lines indicate doors. The capital letters A and B, together with the line running between the two letters, indicate the route taken by Rogers. (R. 342, 343, 353.)

After Rogers had entered the kitchen, James shortly thereafter came into the kitchen through

the doorway from the dining room. (R. 344.) James opened the door to the bathroom from the kitchen and entered the bathroom and stepped back into the kitchen and called Rogers, whereupon Rogers and James went into the bathroom. Rogers then saw Winona lying naked and apparently dead in the bathtub, which was about four feet in length, on her back with her head under the faucet end of the tub, her feet over the rounding edge of the tub, her face at about the surface of the water with the water just barely covering her nose and mouth; her eyes were open, the water in the tub was luke warm and soapy, and her body was warm. James and Rogers then carried the body of Winona from the bathroom through the doorway leading into the bedroom and placed her on the bed. (R. 346, 347, 350, 353, 357-360.)

At about 6 o'clock that evening Dr. George B. Gilmore, a practicing physician and coroner of the county, arrived at the cottage and observed the body of Winona lying on the bed in the bedroom, observed the bathtub was about one-third full of soapy water, and observed a wash basin in the bathroom. (R. 361-363, 369, 370.) He talked to James who told him that he had gone that morning to Colorado Springs and waited over for the afternoon mail; that he returned to Manitou Springs and purchased groceries; that he then went to the cottage; that he didn't find his wife in the bedroom; that he looked in the bathroom and found her in the

bathtub; that the delivery man from the grocery store was in the house at the time and the two of them had taken her from the tub and placed her on the bed; that he had found the Ivory soap carton on the kitchen table or drainboard out of its position and he presumed that some of these soap flakes had been put in the tub after the water had been drawn; that Winona had previously sustained a head injury and had been in a hospital and while in the hospital, she had requested the doctor and nurses to shampoo her hair and the request had been repeatedly refused; that since living in the cottage she requested him to shampoo her hair which he refused to do because the doctor ordered that her hair be not washed; that when he left the cottage that day, she was in bed where she had been instructed to stay and he assumed that she had taken advantage of his absence and had gone to the bathroom, had run water in the tub, put Ivory flakes in it, and that her body was unclothed with her nightgown in the corner of the bathroom. (R. 363, 364.)

Dr. Gilmore told James that it would be a good plan to have an autopsy on the body "so that we might better know exactly what had been the cause of death." James replied, "he just couldn't permit anything of the sort, and much preferred that I wouldn't have the autopsy." (R. 365.)

Dr. Gilmore made out a death certificate showing the cause of death as drowning. (R. 746.) He

testified that it is necessary that the cause of death be first ascertained before the body is permitted to be buried or removed from the county. (R. 372.)

On October 20, 1932, Winona was buried in Forest Lawn Memorial Park, Los Angeles, California. (Exhibit 64.) The $5,000 policy of insurance in the Prudential Life Insurance Company of America, which provided for double indemnity in case of death by accidental means, contained the following provisions: "The amount of accidental death benefit * * * payable * * * upon receipt of due proof that the death * * * occurred * * * as a result, directly and independently of all other causes, of bodily injuries, *effected solely through external, violent and accidental means*, of which, except in case of drowning or of internal injuries revealed by an autopsy, there is a visible contusion or wound on the exterior of the body, and that such death occurred within ninety days of the accident, * * *." Exhibit 62.)

On October 21, 1932, James with the aid of Pries, the insurance salesman from the Prudential Life Insurance Company of America, drafted a letter which James sent to Doctor Hanford, attending physician of Winona when she was in the hospital, and also a letter to the Swan Funeral Home in Colorado Springs. (R. 405.) In the letter to Doctor Hanford James stated that, "In going through the insurance papers we find that there is a clause which relieves the company from pay-

ing for accidental drowning except it is directly caused by another accident which we all know is true in this case, if she was drowned. The coroner's decision as it now stands may make it impossible for us to collect the insurance * * * but we are told that if the real cause of this accident is told in the death certificate we will have no difficulty in collecting * * *. We know you will do everything you can for us and wonder if you could have this verdict changed or add the words 'cause by cerebral hemorrage' or words to that effect. * * * We expect a quick settlement but owing to the incomplete statement on the death certificate we are told there is apt to be a delay unless this is completed before the claim is sent in. * * * We claim that her death was directly caused by her serious injury in the automobile accident." (R. 368, 369.)

In the letter to the Swan Funeral Home, James stated that, "After looking over my insurance papers I find that the company may not pay for accidental drowning. I wish you would get in touch with Dr. Hanford and assist him in having the coroner's certificate changed. I am sending you a copy of the letter which I have sent to the doctor so that you will know what I have told him. * * *" (R. 368.)

Dr. Gilmore received from Dr. Hanford the two letters hereinabove mentioned and changed the death certificate to read that the primary

cause of death was accidental drowning with a contributing cause as skull fracture and head injury sustained on September 21st at the time of her injury in the automobile. (R. 366, 372.) He did not know, and Dr. Hanford never told him, that cerebral hemorrhage was a contributing cause of death. (R. 371.) Neither did he know the circumstances surrounding the automobile accident on Pike's Peak, particularly as to the finding of a bloody hammer in the car, the blood on the cushion and on the back of the right-hand side of the seat, and the body out of the car on the right-hand side thereof, nor as to James' claim that she was driving the car at the time of the accident. (R. 373, 375.) Dr. Gilmore forwarded four copies of the death certificate, as amended, to James in Los Angeles, California. (R. 367.)

On October 26, 1932, James presented to the Prudential Life Insurance Company of America his claim and proofs of death setting forth the cause of death as "Accidental Drowned in Bath tub Fractured Skull Auto Accident." (Exhibit 63.) On January 18, 1933, the Prudential Life Insurance Company of America issued its check to James in the amount of $10,092.10 which he cashed in payment of all claims under the policy with that company. (R. 731, Exhibit 65.) On December 15, 1933, James received from the Policy Holders Life Insurance Association the sum of $3,000 under the policies with that company. (Exhibit 70.)

2. Evidence Relating to the Murder of Winona James Did Not Come Without Notice to Petitioner

The foregoing evidence, relating to the first wife, Winona James, was established by witnesses residing in both California and Colorado. The taking of the life of Winona James occurred as a result of a scheme executed partly in California and partly in Colorado. The actual drowning, together with the contributory cause of death, the Pike's Peak episode, occurred in Colorado while all prior steps, including the selection of the victim, the obtaining of double indemnity upon her life, the borrowing of money upon her insurance with which to take the trip to Colorado, and her final burial after death, all occurred in California.

It is true that the indictment upon which James was tried and convicted merely charged him with the murder of Mary Emma James and that he was not therein accused of the murder of Winona James. He was not, as he asserts, tried for the death of Winona James in the proceeding at bar, as is shown by the instructions hereinafter mentioned, given to the jury by the trial court.

The record shows that James was questioned prior to his indictment about the death of Winona James. (R. 374.) At the commencement of the trial the opening statement of the people indicated that testimony of this kind would be offered. (R. 688, 689.) At the trial during the direct examination of witness J. D. Rogers the question of

relevancy and admissibility of the evidence, relating to the murder of Winona James, was argued at length by counsel for the prosecution and defense, at which time numerous authorities were cited and no contention was then or at any other time made that the defense was taken without notice. During the discussion counsel for James admitted he had researched the question and was prepared on the law applicable to the matter of the admissibility of this evidence. (R. 259, 260.)

3. Process of Court Was Available to Petitioner

Under the law of California, a defendant has the right to take depositions of witnesses who do not reside within the jurisdiction of the courts of California and thus secure unto himself the benefit of such testimony.

Penal Code, Sections 1349 to 1362.

At the conclusion of the prosecution's evidence in chief, counsel for James requested a continuance for the purpose of taking the deposition of "the witness who had communicated to us and such other witnesses as we may find at Colorado Springs." (R. 684.) The witness who had communicated with the defense did so by letter, postmarked June 24, 1936, and the matter was first called to the attention of the Court on July 9, 1936. (R. 685, 688.) The prosecution resisted the motion for a continuance for lack of sufficient showing of the specific matter which the witness would testify to, except in

regard to the general appearance of Mrs. James; further that the prosecution had been willing to take the deposition at any time upon stipulation, but no such request had been made; also that there was no necessity for a continuance in order to obtain the deposition. (R. 688.) The court denied the request for a continuance because of the insufficiency of the showing therefor. (R. 690.) However, there was ample time within which to take such deposition as the evidence was not concluded until July 20, 1936 (R. 820), and the motion was not renewed.

It is well-settled law in California that a motion for a continuance must be supported with affidavits setting forth facts warranting the trial court in granting the application.

People vs. *Rokes*, 18 Cal. App. (2d) 689, 694.

It is elementary that the matter of continuance rests within the sound discretion of the trial court, and its action in that respect is not ordinarily reviewable. It would take an extreme case to make the action of the trial court in such a case a denial of due process of law.

Franklin vs. *South Carolina*, 218 U. S. 161, 168, 169, 30 S. Ct. 640, 54 L. Ed. 980;

Minder vs. *Georgia*, 183 U. S. 559, 22 S. Ct. 224, 46 L. Ed. 328;

Van Dam vs. *United States*, 23 Fed. (2d) 235.

4. Relevancy of the Evidence Relating to the Murder of Winona James

Where one is charged with murder it is within the discretion of the trial court to permit the introduction of evidence tending to establish a prior murder, where the proof of such prior murder tends to throw light upon a particular fact or explain the conduct of a particular person, which fact or conduct has a bearing upon some issue in the case for which a defendant is tried. Because of the discretion in the trial court, the ruling by said court, permitting the introduction of such evidence, will not be disturbed unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue and is calculated to prejudice the accused in the minds of the jurors. There are many circumstances connected with a trial, the pertinency of which a judge who has listened to the testimony, and observed the conduct of the parties and witnesses, is better able to estimate the value of than an appellate court, which is confined in its examination to the very words of the witnesses, perhaps imperfectly taken down by the reporter.

Moore vs. *United States*, 150 U. S. 57, 60, 14 S. Ct. 36, 37, 37 L. Ed. 996;
People vs. *Smith*, 13 Cal. (2d) 223, 227.

It is the settled law of California that where the accused is on trial for the murder of his second wife the prosecution may introduce evidence as to the death of the first wife and the fact that her life was

insured with the accused as beneficiary to show the motive of accused in the murder of his second wife.

People vs. *Gosden*, 6 Cal. (2d) 14, 24.

Proof of other acts similar to the one for which the defendant is on trial has been repeatedly approved for the purpose of showing motive, intent and purpose of the actor, by the appellate tribunals of California and the Supreme Court of the United States, in the following cases:

People vs. *Pozzi*, 91 Cal. App. 150, 158, 159;
People vs. *Burns*, 16 Cal. App. 416, 420, 421;
People vs. *Poo On*, 49 Cal. App. 219, 223;
People vs. *Egan*, 133 Cal. App. 152, 157, 158;
N. Y. Mutual Life Insurance Co. vs. *Armstrong*, 117 U. S. 591, 29 L. Ed. 997;
Wood vs. *United States*, 16 Peters 341, 10 L. Ed. 987, 41 S. Ct. 339.

Evidence of similar transactions is admissible where the object thereof is to show system or design. Such evidence has repeatedly been held in California to be admissible.

People vs. *McGill*, 82 Cal. App. 98, 102, 103;
People vs. *Stutsman*, 66 Cal. App. 134, 138;
People vs. *Barnes*, 111 Cal. App. 605, 613;
People vs. *Francisco*, 112 Cal. App. 442, 444;
People vs. *Cosby*, 137 Cal. App. 332, 334, 335;
People vs. *King*, 4 Cal. App. (2d) 727, 730-731;
People vs. *Deysher*, 2 Cal. (2d) 141, 148, 149.

Where it is claimed by the accused that the act in question was innocently or accidentally done, or done by mistake, or where the evidence is susceptible to

such an inference, proof of other acts of the same general character is admissible to show that the act in question was the product of a designing mind rather than the result of mistake, accident or misfortune. This principle has been applied in murder cases in California and other States:

People vs. *Craig*, 111 Cal. 460, 468, 469;
People vs. *Morani*, 196 Cal. 154, 160;
Commonwealth vs. *Snell*, 189 Mass. 12, 75 N. E. 75, 3 L. R. A. (N. S.) 1019;
Holt vs. *United States*, 42 Fed. (2d) 103, 106, 107,

as well as in the famous English bath tub murder case of R. vs George Joseph Smith, Criminal Appeal Reports, Volume XXI, p. 229, at pages 231, 236 and 237. At the trial of George Joseph Smith, the trial court used the following illustration in instructing the jury with regard to the manner in which they could consider the proof that the prisoner had had two other wives die by drowning in a bath tub subsequent to the drowning of the wife for which he was then on trial. The actual instruction may be found in the series entitled "Notable British Trials" printed by the Canadian Law Book Company, Ltd., and the volume containing the trial of George Joseph Smith, as edited by E. R. Woodson, at pages 274 and 275. We recognize that the work referred to may perhaps not be considered an authentic work, and thus not a proper source from which an official citation may be gleaned. The citation about to be quoted from the aforesaid famous trial is given solely for the

purpose of giving due credit to that source for the idea hereinafter contained. We adopt the idea as our own, for the purposes of illustrating the view taken by the trial court in permitting the introduction of the evidence relating to the prior wife, Winona Wallace James. It aptly illustrates the persuasive effect of other acts of a similar nature.

"You may use the evidence as to the other deaths for this purpose—to see whether it helps you as to whether the death of Miss Mundy was accidental or designed. It is putting it in a different way, but you may use it for this purpose; if you think that the prisoner has a system of obtaining money from women by going through the form of marriage with them and then getting the money either by robbery or murder, you may use the evidence of the other deaths for that purpose.

"Now, I want to give you one or two illustrations of that sort of thing, in order that you may exactly understand for what purpose you may use these other deaths. Let us get away from crime for a moment. You are playing cards for money with three men; suddenly in the pocket of one of them is found a card of the pack you are playing with. Possibly your first view would be—it would depend a good deal on what sort of a card it was; if it was a 'two' of one of the suits that was not trumps you would not think very much of it. Cards do sometimes tumble into odd places. If it happened to be the ace of trumps in the game you are playing at that time you might regard the matter with more suspicion, and, perhaps in view of the

fact that cards do tumble about, you might say that in that one case only you could not form any opinion about it. But supposing on your mentioning it to some one else it turned out that on five previous occasions of playing for money the gentleman had had the fortunate accident of finding the ace of trumps in his coat pocket, what would you think then? What the law says you may think is that that series of fortunate accidents does not usually happen to the same person so many times, and that you may draw from that series of fortunate accidents the inference that it was not an accident at all, but that it was designed. That illustrates the way in which you may use, in dealing with a criminal case, the occurrence, the repeated occurrence, of the same accident to a person who benefits by the accident each time."

Proof of the prior commission of acts of a similar nature by one on trial has been recognized as some evidence of the identity of the perpetrator of a particular crime. This rule has been recognized in the State of California and in other States and by the Supreme Court of the United States.

Boyd vs. *United States,* 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077;
People vs. *McWilliams,* 117 Cal. App. 732, 736;
People vs. *Sindici,* 54 Cal. App. 193, 197, 198;
State vs. *King,* 111 Kan. 140, 206 Pac. 883, 22 A. L. R. 1006.

5. Trial Court's Instructions to the Jury

It must be assumed, in view of the absence in the record of the instructions given by the trial court, that the jury were duly and properly instructed as to the purpose for which this evidence was admitted and the extent to which it could be considered by the jury in passing upon the guilt or innocence of the accused. In the opinion written by the Supreme Court of the State of California, it is said:

> "In its instructions to the jury, several of which were requested by the defendant, the court below properly limited the purpose for which the jury might consider this evidence.' (R. 1107.)

Conclusion of Point III

We respectfully urge that petitioner's claim that he was denied due process of law, guaranteed by the Fourteenth Amendment of the Constitution of the United States, relative to the introduction of evidence of the Colorado affair, is unfounded. This evidence was not admitted generally, but only for limited purposes, and petitioner had notice that such evidence would be offered at his trial and process of the court was open to him to take depositions if he so desired. The relevancy of this evidence was argued at length before the trial court and twice passed upon by the Supreme Court of the State of California, first, in its original opinion and later in a subsequent opinion rendered on a rehear-

ing. The trial court was not informed that any particular witness was desired by petitioner or that any witness would testify if produced to any particular matter if his presence could be secured in connection with the application for continuance. It does not appear by affidavit, or otherwise, that any person, either in California or Colorado, who had knowledge of facts favorable to petitioner, had declined to attend the trial.

Assuming for the sake of argument, that the trial court erred in receiving the evidence relating to the murder of Winona James in Colorado, nevertheless, such an error does not raise a Federal question within the meaning of the Fourteenth Amendment of the Constitution of the United States. In order that it may be said that due process of law has been denied to petitioner, it must affirmatively appear, not only that error was committed by the trial court, but further, that the error was so gross as to amount to no trial at all, as that term is ordinarily understood.

Re Converse, 137 U. S. 624, 34 L. Ed. 796, 11 S. Ct. 191;

Arrowsmith vs. *Harmoning*, 118 U. S. 194, 30 L. Ed. 243, 6 S. Ct. 1023;

American R. Express Co. vs. *Kentucky*, 273 U. S. 269, 71 L. Ed. 639, 47 S. Ct. 353;

Roberts vs. *New York*, 295 U. S. 264, 79 L. Ed. 1429; 55 S. Ct. 689;

Howard vs. *Kentucky*, 200 U. S. 164, 50 L. Ed. 421, 26 S. Ct. 189.

IV. PETITIONER CLAIMS THAT THE TESTIMONY OF THE WITNESS CHARLES H. HOPE WAS FALSE AND KNOWN TO THE PROSECUTION TO BE FALSE AND THEREFORE THE TRIAL WAS A MERE PRETENSE AND WAS IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

This point was presented to the Supreme Court of the State of California in two ways: First, by a petition for rehearing filed October 25, 1939 (R. 842), wherein were set forth copies of affidavits theretofore filed in the Superior Court of the State of California, in and for the County of Los Angeles, by the witness Charles H. Hope in connection with a motion therein on his part to secure an order setting aside the judgment and granting him leave to withdraw his plea of guilty theretofore entered in the case and to substitute a plea of not guilty (R. 885, 891); second, by a petition for a writ of habeas corpus filed October 31, 1939 (R. 1, No. 134), wherein petitioner stated:

> "That this court has before it the entire records, files and exhibits in the said case, and that each and every part of the testimony of all the witnesses, exhibits, files, records and affidavits presented on the trial of said case are made a part of this petition by reference, as though herein fully set forth." (R.15, No. 134.)

Obviously, under well settled rules of practice, the Supreme Court of California would not consider these affidavits (filed after a motion for new trial had been denied and judgment rendered in the lower court) in connection with petitioner's appeal, as the matters which could be considered on appeal were limited to the proceedings in connection with the trial, application for a new trial and judgment in the lower court. However, the matter if properly presented could have been passed upon and evidently was passed upon in ruling upon the petition for a writ of habeas corpus. We shall therefore consider the matter as presented by the petition for writ of habeas corpus and the Court's refusal to issue such writ.

The affidavits of the witness Charles H. Hope (R. 920-936) were sworn to by Hope on June 22 and 28, 1939, a period of time approximately three years after Hope had been sentenced to imprisonment in San Quentin for life. (R. 928.) These affidavits consist largely of statements of conclusion of fact intermixed with law with frequent reference to the language of Mr. Justice Seawell of the Supreme Court of California, in his dissenting opinion in the instant case. The affidavits were obviously filed by Hope for the purpose of trying to escape punishment for his crime. In them he states his opinion that petitioner James "was in such a condition of mind as to be temporarily incompetent whether from alcohol or otherwise, and his evi-

dence hence of no value (Mythomania), at the time James found the dead body of his wife, following a long series of attempts on her own part to commit the crime and wrong of abortion," etc. (R. 924.) He further says that he "does not believe that defendant James was capable of understanding what he was saying or doing, due to intoxication and mental condition then present." (R. 824.) This is followed by some conclusions on the subject of affiant's ideas as to whether decedent may have tried to commit an abortion. (R. 924-925.) He says that the "theory of the prosecution of death by rattlesnakes was and is a false one and was known to the State prosecuting officials to be false." (R. 926.) Numerous other matters of opinion and conclusion are contained in the affidavits. Interspersed with these matters are a few statements of fact. Affiant avers that the State knowingly and wilfully produced false testimony that the rattlesnakes had bitten the deceased when "as a matter of fact affiant refused to so testify and said that the story was all 'bunk' or untrue." (R. 926.) He further says that he told some of the prosecuting officers that "to his knowledge no rattlesnake ever bit or poisoned James' wife" but that the officials induced him falsely to so testify. (R. 926.) He also states that he had been instructed to testify to the story "that they had given me and that had been gone over by them with me hundreds of times" and that he should testify

that he had not discussed what he proposed to testify to with anyone and had not been promised anything although this was untrue. (R. 927.) He says that Detective Southard told him it was absolutely necessary to say that he saw the snake bite the woman which affiant refused to do and that then Southard threatened him. (R. 927.)

His contentions in this regard are summed up by him as follows:

> "However, the thing is simply this as far as I'm concerned,—all its doctrines were conceived in error, founded on fallacy, propagated by falsehood and are, in short, puerile, idiotic and utterly asinine." (R. 927.)

In his second affidavit he expressly states that the three specific instances of the knowing inducement and use of false testimony by State officials are that (1) the snake bit and poisoned the decedent; (2) no promises of leniency or reward had been made to affiant; and (3) no threats had induced the false testimony. (R. 932.) He then repeats some of the matters hereinbefore adverted to.

The above assertions contained in the affidavits of the witness Hope coming at a time nearly three years after he had commenced to serve his sentence, incoherent though they are and lacking in that specific detail which would give them much value as evidence, were presented to the Supreme Court of California together with all of the evidence adduced at the trial. Consequently, said Supreme Court had

before it a great mass of evidence which was entirely in conflict with the statements contained in Hope's affidavits. As has already been set forth in this brief, Hope had testified in detail to the procuring of rattlesnakes and as to the circumstances surrounding the death of Mary James. His testimony with respect to procuring the rattlesnakes was corroborated by the testimony of the witnesses Roland H. Kirby (R. 190), Mike Allman (R. 195-197), Joe Houtenbrink (R. 202-204), Mrs. Edna Hope (R. 178-184), and the confessions of petitioner James. (R. 643-647.) His testimony about having obtained boxes with glass covers in which to keep the snakes was corroborated by the witness Irving Sherman (R. 199-200) and his testimony with reference to the disposition of the boxes was corroborated by the testimony of the witness Mrs. Edna Hope. (R. 182.) His statements in the affidavits to the effect that the snake did not bite Mary James is in conflict with his testimony at the trial. He testified on direct examination simply that her foot was put in the box with the snake. (R. 75.) However, on cross examination he testified that the snake struck her in the region of the lower part of the foot (R. 154) and subsequently on further cross examination he stated in detail that he was watching the snake, saw the snake strike, and the position of Mary James' foot with relation to the interior of the box, and the position of the snake. (R. 667.)

His statements in his affidavits to the effect that he had been coached and instructed what to say is in sharp conflict with his testimony to the opposite effect. (R. 173-176.) He also testified in the course of the trial, on cross examination, that at the time he was arraigned in the superior court a few days before the trial, the indictment was read to him and that upon being asked to state his plea he said he was guilty and personally interposed that plea. (R. 176.)

Hope's statement in his affidavits to the effect that he had been held incommunicado for 18 days is in conflict with his statement at the trial to the effect that he had been out of the county jail with the officers in connection with the preparation of the case for trial one time only and that at that time he went to his home and to the United States Post Office to get his bonus. (R. 174.)

The statement of Hope in his affidavits to the effect that Mary James had not been struck by a rattlesnake is controverted to an extent at least by the testimony of Dr. Wagner, the autopsy surgeon, and Dr. Boehme, to the effect that Mary James' foot bore a laceration and her leg evidenced a swelling and cellulitis of such character as might be caused by the bite of a rattlesnake. (R. 97, 110.)

We thus have presented a situation where the Supreme Court had before it for consideration, in determining whether to grant a writ of habeas corpus, the entire record in the proceeding which was made a part of the petition, including the testi-

mony given by Hope and all other witnesses, as opposed to the matters set forth by Hope in his affidavits. The burden was on petitioner to show a right to the writ.

The overwhelming weight of the evidence as disclosed by the record was to the effect that Hope had not testified falsely and that his belated claim to that effect was merely the effort of a guilty man to escape the punishment which he was suffering for his crime.

Under these circumstances the Supreme Court denied the petition for writ of habeas corpus, without prejudice (R. 17), thereby leaving the matter in such state that if the petitioner could thereafter make a reasonable and clear showing of his right to a writ of habeas corpus, the Supreme Court of California was still in a position, upon a proper showing, to grant such a writ.

Under these circumstances we respectfully submit that there is still available to the petitioner, if he can make a proper showing, a remedy under the laws of the State of California under the principles set forth by this honorable Court in the case of *Mooney* vs. *Holohan*, 294 U. S. 103, 55 S. Ct. 340.

It clearly appears that, if a proper showing is made to the Supreme Court of the State of California, it still has jurisdiction, has not cut the petitioner off from the right to apply for a writ of habeas corpus to that Court, and that, if such showing can be made, "recourse should be had to what-

ever judicial remedy afforded by the State may still remain open." (*Mooney* vs. *Holohan, supra.)*

Therefore, it is respectfully submitted that neither the due process clause nor the equal protection clause of the Fourteenth Amendment of the Constitution of the United States was violated by the introduction in evidence of Hope's testimony. The weight of the evidence presented to the Supreme Court of the State of California was to the effect that his testimony was not false. It is further submitted that if a proper showing is made by petitioner, there is still available to him the judicial processes of the State of California. Consequently, under the rule in the case of *Mooney* vs. *Holohan, supra*, this Court will not act.

V. PETITIONER ASSERTS THAT HE WAS DEPRIVED OF THE RIGHT OF COUNSEL AFTER HIS ARREST AND AT THE TIME HE WAS INTERROGATED AND THAT THEREFORE THE USE OF HIS STATEMENTS CONSTITUTES A VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

In support of this point petitioner has referred in his brief to *Powell* vs. *Alabama*, 287 U. S. 45, 53 S. Ct. 55, and other cases in which the right of accused to counsel is set forth.

The Constitution of the United States provides that an accused shall have "the assistance of coun-

sel for his defense." (United States Constitution, Sixth Amendment.) The Constitution of the State of California provides that the accused shall have the right "to appear and defend, in person and with counsel." (Constitution of California, Article I, Section 13.) The respondent does not question the right of petitioner or any other person accused of a crime to have the advice or assistance of counsel in all stages of the proceedings. It is submitted, however, that this constitutional right, whether arising under the express provisions of the California Constitution or by necessary implication under the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States is a right to counsel at all times from the time that the criminal proceeding is instituted until its completion. This right of course includes the right to consultation with such counsel, and adequate opportunity to defend the case at all stages.

As to the right of an accused to have counsel subsequent to his arrest and prior to any proceeding in court against him, petitioner directs attention to Section 825 of the Penal Code of the State of California which provides *inter alia* that any officer having charge of a prisoner who wilfully refuses or neglects to allow an attorney, who has been requested by the prisoner or a relative, to visit the prisoner is guilty of a misdemeanor, which provision, of course, has no bearing upon the question

of whether the due process or equal protection clause of the Fourteenth Amendment of the Constitution of the United States has been violated.

Be that as it may, the record herein of the testimony of the people's witnesses, which was believed by the trial court and jury, and the testimony of his own counsel, does not bear out the assertions of petitioner that he was held incommunicado for two days and nights in a private home without being taken before the nearest and most accessible magistrate and without being allowed the counsel of his choice; that thereafter he was held in jail, in the "High Power Tank," and was constantly under observation and his counsel visited him only once, and that he was told, when he asked the officers to call attorney Parsons, it would take too long to inform Parsons about the case. (We are unable to insert page reference to the above in petitioner's brief because at the writing hereof, respondent has been served with only a typewritten copy of said brief.)

The record discloses that about the twenty-second of March, 1936, J. E. Southard, an investigator for the district attorney's office, commenced an investigation into the death of Mary James, and while investigating this matter, he arrested James on a felony committed in his presence, i.e., the crime of incest on Sunday, April 19, 1936, at about 9 o'clock a.m. (R. 456, 458, 463, 560, 561); that James was taken before the district attorney who questioned

him about the incest and showed him a typewritten statement made by James' niece Lois Wright, confessing the offense, at which time James refused to talk to the district attorney (R. 466-468); that at about 5 o'clock that afternoon, James was taken to a house adjacent to the one he was living in and questioned by the police and investigators of the district attorney's office (R. 555, 560); that he was returned to the district attorney's office on Monday, April 20, 1936, where James conferred with his counsel, Mr. Silverman (R. 571); that on April 21, 1936, at about 10 or 11 o'clock a.m., James was booked in the county jail (R. 576) and on this same day he was arraigned in the superior court on the crime of incest and was represented at the arraignment by his attorney, Mr. Silverman (R. 483); that between the time of his arraignment on said charge of incest and May 2, 1936, his attorney, Mr. Silverman, visited him in the county jail on April 25, 1936, and saw him on several days thereafter until about a week later at which time Mr. Silverman called upon petitioner in the attorneys' room at the county jail and advised him that if questioned, not to answer any questions unless it was in his (Silverman's) presence (R. 481, 482); that James was not again interviewed by the authorities until about 11.45 a.m. (Saturday), May 2, 1936, at which time he was taken to the Chaplain's room in the county jail and told in the presence of Hope, who was arrested on May 1, 1936, that Hope had confessed

and he (James) was asked if he had any statement to make relative to anything stated by Hope which incriminated him (James) in the death of Mary James and answered, "nothing" (R. 493, 494, 630, 631, 732, 733); that later in the afternoon of May 2, 1936 (R. 624), James was again interviewed by the authorities in the office of the district attorney at which time he asked if he couldn't have a chance to ask his attorney whether he should answer questions and was told that they were attempting to get in touch with Mr. Silverman; that James was present during the telephone conversation and it was communicated to him that Mr. Silverman was at Murrieta Hot Springs; that James asked for an attorney whose name he didn't know (R. 625); that inquiry wa made as to who the attorney was and those present concluded it was Mr. Parsons (R. 626); that an effort was made to get in touch with Mr. Parsons, but "we were unable to"; that thereafter James did not say he didn't want to proceed without an attorney being present and did not thereafter ask for another attorney (R. 628); that shortly before midnight, James said to Deputy Sheriff Killion, in the presence of Deputy Sheriff Gray, "Why don't we go out and get something to eat, and I will tell you the story"; that Killion said, "All right"; that in Killion's automobile they went to a restaurant at 5th and Figueroa Streets, and upon being seated, Killion said to James, "Well, do you want to tell us the story now?"; that James

said, "No, let's have something to eat, first"; that they ordered a steak dinner; that after dinner was finished they bought cigars and James had a cigar; that James said, "Now, you want to have this story?"; that Killion said, "Yes"; that James said, "All right, there is no hurry, is there?"; that Killion asked James if he wanted to go back to the office to tell the story and James said, "No, this is all right, isn't it?"; that Killion said, "Sure, it is all right." (R. 633.) James, thereupon, related the circumstances surrounding the death of Mary James (R. 634-639), at the conclusion of which James said, "Now, that is the story, and I never would have told it if Hope hadn't squealed. There isn't enough men in the district attorney's office to make me talk." (R. 639.) Later, James again told his story while in the office of the district attorney, which story was reduced to writing. On May 6, 1936, he was indicted with Hope for the murder of Mary James. (R. 815.)

At the time petitioner confessed his participation in the murder of Mary James, he had been informed by his own counsel and believed that he was going to be indicted for murder. Petitioner's testimony on this matter is as follows:

> "Q. By the way, had Mr. Silverman, before you were taken to the Chaplain's room, given you any instructions as to what you should do if you were questioned further by the officers?
>
> "A. He had.

"Q. What instructions did he give you?

"A. He told me I was going to be indicted for murder and if the officers questioned me to tell them that I wouldn't talk unless he was there.

"Q. When Mr. Silverman told you that you were going to be indicted for murder, did you believe that you would be?

"A. I did."—(R. 494, 495.)

It thus appears that petitioner's assertions, heretofore related, are not sustained by the record above recited. He was not as he claims held incommunicado for two days and nights, but conferred with his counsel on Monday following his arrest on Sunday. He was not as he claims visited by his counsel only once, but was visited by his counsel several times between April 21, 1936, when he was arraigned in court on the incest charge, and the filing of the indictment against him for murder. He was not as he claims told that it would take too long to inform attorney Parsons about the case, but that an effort was made to get in touch wih Mr. Parsons, which effort proved futile. This was in the afternoon of May 2d, (a Saturday).

Petitioner seeks to have read into the due process and equal protection clauses of the Fourteenth Amendment a certain canon of professional ethics, i.e., that a lawyer should not in any way communicate upon the subject of controversy with the opposite party but only with his counsel and if not represented by counsel, to avoid doing anything

which might mislead him. Obviously, such canon has reference to civil and not criminal matters and it is doubtful whether the courts will go so far as to include the same in the organic law.

The appellate court of California has had before it for determination instances in criminal cases where error was claimed to have been committed by the trial court in permitting the introduction in evidence of an accusatory statement when the record showed that the accused had remained silent upon advice of his counsel. The court held that such circumstance might affect the probative weight but not the admissibility of such evidence. (*People* vs. *Graney*, 48 Cal. App. 773, 775; *People* vs. *Wilson*, 61 Cal. App. 611, 621.)

CONCLUSIONS REACHED BY SUPREME COURT OF CALIFORNIA

Pertinent conclusions were reached by the Supreme Court of the State of California when passing upon the merits of petitioner's appeal and we quote some of them which pertain to the subject under discussion, namely:

> "That he was questioned for many hours is not, of itself, improper, particularly when, as testified, he freely responded thereto. Some recognition must be given to the practical problems presented in the work of crime detection. A reasonable conclusion, and one which the trial court and jury might have readily reached on all the evidence, is that the defendant broke

down and confessed his participation in the crime only after his confederate and accomplice had been arrested and detailed the murder conspiracy and had been brought face to face with the defendant who had been informed of the details of his confederate's story. Each case must turn on its own facts and we therefore give but passing mention to the authorities relied on by the defendant." (R. 1101.)

"Regardless of the impropriety of holding and continuously examining the defendant for many hours in a place other than a county jail prior to the filing of any charge against him, a course which we expressly disapprove, it is of the utmost significance that a confession was neither obtained nor extracted from the defendant during such period. The record definitely discloses that this treatment of which defendant here complains failed of its asserted objective. In other words, no matter how improper the treatment of defendant between April 19th and 21st, a confession did not result therefrom. It was not until May 3, 1936, twelve days later, that the confession sought to be introduced was obtained. In this respect, the evidence shows that the defendant was removed from the private house when he had been held and booked at the county jail on April 21st. One of his counsel took the stand and testified that he saw the defendant in the county jail on April 25th, at which time he instructed the defendant not to answer any questions in his absence. On cross-examination, said counsel admitted that 'he saw the defendant 'when he was arraigned' on April

21, 1936. It is apparent, therefore, that the defendant was not held incommunicado when the confession was forthcoming. He had enjoyed the benefit and association of counsel and had been before the grand jury and the court. It is also of the utmost importance that the defendant did not confess until after Hope, his accomplice, had been arrested on May 1st and had told the story to the officers in charge of the investigation. The defendant's confession followed within two days thereafter." (R. 1097, 1098.)

For the foregoing reasons, petitioner's assertions under this point are without merit.

VI. PETITIONER CONTENDS THAT HE WAS DENIED EQUAL PROTECTION OF THE LAWS

In support of his argument under this point, petitioner quotes the following language in *Yick Wo* vs. *Hopkins,* 30 L. Ed. 220, 227:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Petitioner attempts to apply this doctrine to his case by arguing that although the laws of California provide the right of counsel from the very commencement of one's arrest for crime and

the benefit of counsel at all times thereafter, and provide that he shall be taken immediately (without unnecessary delay, Section 849 Penal Code) before the nearest and most accessible magistrate, such laws were applied and administered by the officers of the law as to him with an evil eye by taking him to a private house adjoining his home and showing him the dictograph apparatus and by an evil hand by Officer Southard committing battery upon him.

This Honorable Court used the above quoted language in *Yick Wo* vs. *Hopkins, supra,* in passing upon the validity of an ordinance of the City and County of San Francisco regulating laundries where the facts in the case showed that the board of supervisors withheld permission to two hundred or more Chinese subjects to carry on such business and had granted permission to eighty others, not Chinese subjects, to carry on the same business under similar conditions.

The equal protection clause of the Fourteenth Amendment of the Constitution of the United States has to do with the application of laws and not with individual invasion of individual rights. (*Civil Rights Cases*, 109 U. S. 3, 9.) Mere error of judgment on the part of officials will not support a claim of discrimination. (*Sunday Lake Iron Company* vs. *Township of Wakefield*, 247 U. S. 350, 352, 62 L. Ed. 1154.) The equal protection clause has to do with intentional and systematic

discrimination by the law itself or by those charged with its enforcement. (*Smith* vs. *State of Texas*, 61 S. Ct. 164, 165.) No case has been cited by petitioner in which the equal protection clause has been applied or discussed in a situation comparable to that claimed by petitioner herein.

This equally applies to his assertions that he was unjustly discriminated against by reason of the confessions, the rattlesnakes and the Colorado affair being introduced in evidence, and being questioned in the absence of his attorney.

CONCLUSION

In conclusion, we respectfully submit that an analysis of the record demonstrates:

(1) That petitioner's confessions were not coerced from him by threats, bodily injury, mental torture or any other form of coercion; but were the product of his own volition, made because his accomplice had "squealed" and because he desired, in view of the indictment for murder which he believed was to ensue, to place himself in a more favorable light than that in which the statements of his accomplice had shown him.

(2) That the identification, receipt in evidence and exhibiting to the jury of the rattlesnakes which were used in the plan to murder Mary James, were in accord with well established usage and warranted by ample judicial precedent. Their production did not create an "atmosphere of terror" nor unduly excite or prejudice any person against petitioner.

(3) The so-called "Colorado evidence" was received under well recognized and often applied rules of evidence. The fact that witnesses are brought from afar is no reason their testimony should be excluded. Under California statutes petitioner had the right to take depositions. He had ample notice (if such is required) of the purpose of the prosecution to offer evidence of the circumstances of the death of his former wife.

(4) The claim of perjury set forth in the affidavits of Hope is overcome by the other evidence incorporated in the record and placed before the Supreme Court of California to weigh in determining whether to issue the writ of habeas corpus. Therefore that court was justified in denying the petition for the writ. Moreover, said court denied said application without prejudice, leaving to petitioner the right upon a sufficient and proper showing to again apply for a writ of habeas corpus.

(5) Petitioner was not denied the right either to see, consult with, or to be represented by counsel; but, on the contrary, had counsel of his own choosing from the day after his arrest until the conclusion of the case.

(6) No circumstance is shown to exist such as is contemplated in the application of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States; and

(7) Neither, because of any one or more of the matters complained of, was petitioner deprived of

such fair treatment and trial as are contemplated by the due process clause of the Fourteenth Amendment of the Constitution of the United States.

No doubt of petitioner's guilt is shown to exist; all questions as to the deprivation of his constitutional rights rest almost entirely on his unsupported word and are wholly dissipated by a fair consideration of all the evidence; no spirit of racial prejudice or mob domination is presented; he was given ample time for preparation and trial; he was ably represented by three eminent counsel of his own choosing; and a case which, because of its inherent nature (created by the acts of the petitioner himself and his accomplice), might have been ultra-spectacular, was tried in a calm and dispassionate manner.

It is therefore respectfully submitted that the judgment should be affirmed.

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